DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-536
Title: Shaun McCutcheon, et al., Appellants
v.
Federal Election Commission
Docketed: November 1, 2012
Lower Ct: United States District Court for the District of Columbia
Case Nos.: (12cv1034)
Decision Date: September 28, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 26 2012	Statement as to jurisdiction filed. (Response due December 3, 2012)
Nov 14 2012	Order extending time to file response to petition to and including January 2, 2013.
Jan 2 2013	Motion to dismiss or affirm filed by appellee Federal Election Commission.
Jan 14 2013	Opposition to motion to dismiss or affirm of appellants Shaun McCutcheon, et al., Appellants filed. (Distributed)
Jan 16 2013	DISTRIBUTED for Conference of February 15, 2013.
Feb 19 2013	PROBABLE JURISDICTION NOTED.
Mar 1 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from the Solicitor General.
Mar 7 2013	The time to file the joint appendix and appellants' brief on the merits is extended to and including May 6, 2013.
Mar 11 2013	Motion to dispense with printing the joint appendix filed by appellants Shaun McCutcheon, et al., Appellants.
Apr 1 2013	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Apr 22 2013	The time to file appellee's brief on the merits is extended to and including July 18, 2013.
May 6 2013	Brief of appellant Republican National Committee filed.
May 6 2013	Brief of appellant Shaun McCutcheon
May 8 2013	Brief amicus curiae of American Civil Rights Union filed.
May 10 2013	Brief amici curiae of National Republican Senatorial Committee and National Republican Congressional Committee filed.
May 13 2013	Brief amici curiae of Downsize DC Foundation, et al. filed.
May 13 2013	Brief amicus curiae of Wisconsin Institute for Law & Liberty filed.
May 13 2013	Brief amicus curiae of Senator Mitch McConnell filed.

May 13 2013	Brief amicus curiae of Cato Institute filed.
May 13 2013	Brief amicus curiae of Center for Competitive Politics filed.
May 13 2013	Brief amicus curiae of Committee for Justice filed.
May 13 2013	Brief amicus curiae of Institute for Justice filed.
May 13 2013	Brief amici curiae of Tea Party Leadership Fund, et al. filed.
May 13 2013	Brief amicus curiae of Cause of Action Institute filed.
May 13 2013	Brief amici curiae of Thomas Jefferson Center for the Protection of Free Expression and the Media Institute filed.
Jul 18 2013	Brief of appellee Federal Election Commission filed.
Jul 22 2013	CIRCULATED.
Jul 23 2013	SET FOR ARGUMENT on Tuesday, October 8, 2013.
Jul 24 2013	Brief amicus curiae of Brennan Center for Justice at N.Y.U. School of Law filed. (Distributed)
Jul 24 2013	Brief amicus curiae of Americans for Campaign Reform filed. (Distributed)
Jul 25 2013	Brief amici curiae of Representatives Chris Van Hollen and David Price filed. (Distributed)
Jul 25 2013	Brief amicus curiae of Professor Lawrence Lessig filed. (Distributed)
Jul 25 2013	Brief amici curiae of Democratic Members of the United States House of Representatives filed. (Distributed)
Jul 25 2013	Brief amici curiae of The Campaign Legal Center, et al. filed. (Distributed)
Jul 25 2013	Motion of Senator Mitch McConnell for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 25 2013	Brief amici curiae of Communications Workers of America, et al. filed. (Distributed)
Jul 25 2013	Brief amici curiae of National Education Association, et al. filed. (Distributed)
Aug 5 2013	Record from U.S.D.C. for the District of Columbia is electronic.
Aug 16 2013	Reply of appellant Republican National Committee filed. (Distributed)
Aug 19 2013	Reply of appellant Shaun McCutcheon filed. (Distributed)
Aug 30 2013	Motion of Senator Mitch McConnell for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 8 2013	Argued. For appellants: Erin E. Murphy, Washington, D. C.; and Bobby R. Burchfield, Washington, D. C. (for Senator Mitch McConnell, as amicus curiae.) For appellee: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C.

JURISDICTIONAL STATEMENT

RECORD
AND
BRIEFS

No. 12-536

In The
Supreme Court of the United States

Shaun McCutcheon and Republican National Committee, *Plaintiffs-Appellants*

v.

Federal Election Commission

On Appeal from the United States District Court
for the District of Columbia

Jurisdictional Statement

Stephen M. Hoersting
Dan Backer
DB CAPITOL STRATEGIES, PLLC
Suite 2109
209 Pennsylvania Ave., SE
Washington, DC 20003

Jerad Wayne Najvar
NAJVAR LAW FIRM
Suite 100
1 Greenway Plaza
Houston, TX 77046
Of Counsel for McCutcheon

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/235-3685 facsimile
jboppjr@aol.com
Counsel for Appellants

October 26, 2012

Library of Congress
Law Library

Questions Presented

Federal law imposes two types of limits on individual political contributions. *Base limits* restrict the amount an individual may contribute to a candidate committee ($2,500 per election), a national-party committee ($30,800 per calendar year), a state, local, and district party committee ($10,000 per calendar year (combined limit)), and a political-action committee ("PAC") ($5,000 per calendar year). 2 U.S.C. 441a(a)(1) (current limits provided). *Biennial limits* restrict the aggregate amount an individual may contribute biennially as follows: $46,200 to candidate committees; $70,800 to all other committees, of which no more than $46,200 may go to non-national-party committees (e.g., state parties and PACs). 2 U.S.C. 441a(a)(3) (current limits provided) (*see* Appendix at 20a (text of statute)). Appellants present five questions:

1. Whether the biennial limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), is unconstitutional for lacking a constitutionally cognizable interest as applied to contributions to national-party committees.

2. Whether the biennial limits on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), are unconstitutional facially for lacking a constitutionally cognizable interest.

3. Whether the biennial limits on contributions to non-candidate committees are unconstitutionally too low, as applied and facially.

4. Whether the biennial limit on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A), is unconstitutional for lacking a constitutionally cognizable interest.

5. Whether the biennial limit on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A), is unconstitutionally too low.

Corporate Disclosure

Shaun McCutcheon is an individual and the Republican National Committee ("RNC") is an unincorporated association, so no corporations are involved.

Table of Contents

Questions Presented. . . . . (i)

Corporate Disclosure. . . . . (iii)

Table of Authorities. . . . . (viii)

Opinion Below. 1

Jurisdiction. 1

Constitution, Statutes & Regulations. 1

Statement of the Case. 1

The Questions Presented Are Substantial. 4

Introduction. 4

I. The Biennial Limit on Contributions to Non-Candidate Committees Is Unconstitutional for Lacking a Cognizable Interest as Applied to Contributions to National-Party Committees. 5

A. Strict Scrutiny Is Required Because the Biennial Limits Are in Essence Expenditure Limitations, Though Exacting Scrutiny Suffices for Appellants' Success. 6

B. *Buckley*'s Facial Upholding of the Now-Repealed "Overall $25,000 Ceiling" Does Not Control this Case, but *Buckley*'s Concerns Guide the Analysis. . 9

C. Congress Fixed the Problems that *Buckley* Identified. 12

D. In BCRA, Congress Repealed and Replaced the "Overall $25,000 Ceiling" with Multiple Biennial limits. 14

E. The $70,800 Biennial Limit Lacks a Cognizable Interest as Applied to Contributions to National-Party Committees.. 14

1. No Anti-Corruption Interest Applies.. 15

2. No Anti-Circumvention Interest Exists... 16

(a) The Anti-Circumvention Interest and Remedy Are Limited in Scope.. 16

(b) *Buckley* Requires Examination of the Potential for Political-Committee Proliferation, "Massive" Contributions, and Conduit Capability... 17

(c) Congress Imposed a *Political-Committee-Proliferation* Prophylaxis... 18

(d) Congress Imposed a *Massive-Contribution* Prophylaxis... . . . 18

(e) Congress Imposed an *Anti-Conduit* Prophylaxis by Many Prophylaxes.. 19

3. The Challenged Limit Relies on an Unconstitutional Equalizing Interest.. 24

4. The District Court Ignored the Required Conduit-Contribution Analysis and Considered Non-Cognizable Interests... 24

II. The Biennial Limits on Contributions to Non-Candidate Committees Are Unconstitutional Facially for Lacking a Constitutionally Cognizable Interest.. 28

III. The Biennial Limits on Contributions to Non-Candidate Committees Are Unconstitutionally Too Low, as Applied and Facially.. 29

IV. The Biennial Limit on Contributions to Candidates Is Unconstitutional for Lacking a Constitutionally Cognizable Interest.. . 32

V. The Biennial Limit on Contributions to Candidates Is Unconstitutionally Too Low.. . 37

Conclusion. 38

Appendix Table of Contents

Memorandum Opinion with Order and Final Judgment, *McCutcheon v. FEC*, No. 12-cv-1034 (D.D.C. Sept. 28, 2012). 1a

Notice of Appeal to U.S. Supreme Court. 18a

U.S. Const. amend. I. 20a

2 U.S.C. § 441a(a)(3). 20a

Bipartisan Campaign Reform Act of 2002 ("BCRA") § 403(a), 116 Stat. at 113-14. . . . . 21a

Table of Authorities

Cases

Arizona Free Enterprise PAC v. Bennett, 131 S.Ct. 2806 (2011).. 15

Broadrick v. Oklahoma, 413 U.S. 601 (1973). . 28, 31

Buckley v. Valeo, 424 U.S. 1 (1976). . . . . *passim*

California Medical Association v. FEC, 453 U.S. 182 (1981).. . . . . 9, 12-13, 17

Citizens United v. FEC, 130 S.Ct. 876 (2010). *passim*

Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996).. 15

Davis v. FEC, 554 U.S. 724 (2008).. . . . . 9, 15

EMILY's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009).. 15

FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001). 23, 27

FEC v. National Conservative PAC, 470 U.S. 480 (1985). 15, 16

FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007) 17, 31

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000).. 37

Randall v. Sorrell, 548 U.S. 230 (2006). 29-31, 36-37

Republican Party of Minnesota v. White, 536 U.S. 765 (2002).. 24

Virginia v. *Hicks*, 539 U.S. 113 (2003).. . . . . 29, 31

Constitutions, Statutes, Regulations & Rules

11 C.F.R. 100.5(e)(2). 12

11 C.F.R.100.5(e)(3). 12

11 C.F.R. 100.5(g)(1). 34

11 C.F.R. 102.12(c)(2). 33

11 C.F.R. 110.6. 35

2 U.S.C. 432e(3)(B). 35

2 U.S.C. 441a(a)(8). 20, 35

2 U.S.C. 441f. 20, 35

2 U.S.C. 441a(a)(1). . . . . *passim*

2 U.S.C. 441a(a)(3). . . . . *passim*

Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002). . . . . *passim*

Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. 431 et seq.. . . . . *passim*

FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) 12

Federal Rule of Civil Procedure 12(b)(6). 4

H. R. Rep. No. 94-1057. 14

U.S. Const. amend. I. . . . . *passim*

U.S. Const. amend. XIV. 9

Other Authorities

FEC, *Political Party Committees* (July 2009). 20

FEC, *The Biennial Contribution Limit* (2004, updated 2011).. 2

Opinion Below

The yet-unreported Memorandum Opinion, with Order and Final Judgment, is at 2012 WL 4466482 and in the Appendix ("App.") at 1a.

Jurisdiction

On September 28, 2012, the district court granted the Federal Election Commission's ("FEC") motion to dismiss, entering final judgment for FEC. App.17a. Appellants timely noticed appeal on October 10. App. 18a. This Court has appellate jurisdiction under section 403(a)(3) of the Bipartisan Campaign Reform Act ("BCRA"), Pub.L.No. 107-155, 116 Stat. 81, 113-14 (App.21a).

Constitution, Statutes & Regulations

Appended are the First Amendment (App.20a); 2 U.S.C. 441a(a)(3) (App.20a); BCRA 403(a) (App.21a).

Statement of the Case

BCRA enacted two separate biennial limits (one with a sub-limit), in place of one aggregate limit. FEC describes the new limits (App.20a) thus:

> [A]n . . . individual . . . [is] subject to a biennial limit on contributions . . . to federal candidates, party committees and . . . PACs . . . . This . . . includes up to:
>
> - $46,200 in contributions to candidate committees; and
> - $70,800 in contributions to any other committees, of which no more than $46,200 of this amount may be given to committees that are not national-party committees.
>
> * * *
>
> [W]ithin this biennial limit . . . , an individual

may not exceed the specific [base] limits . . . in the contribution limits chart . . . .

* * *

Individual Limits for 2011-2012

Recipient Federal Committee	Limit
Candidate Committee	$2,500* per candidate, per election
National Party Committee	$30,800* per calendar year
State, Local & District Party Committee	$10,000 per calendar year (combined limit)[FN6]
[PAC]	$5,000 per calendar year

* These . . . are indexed for inflation . . . .

FN6 Because local party committees are presumed . . . affiliated with the . . . state committee, a contribution to a local . . . committee counts against the contributor's limit for the state party.

FEC, *The Biennial Contribution Limit* (2004, updated 2011) (citations and footnotes omitted) (*see* http://www.fec.gov/pages/brochures/biennial_limit_brochure.pdf.).

As set out in the Verified Complaint, McCutcheon would contribute $25,000 each to RNC, National Republican Senatorial Committee ("NRSC"), and National Republican Congressional Committee ("NRCC") before the November 2012 election but for the biennial limit, 2 U.S.C. 441a(a)(3)(B). In this biennium, he has given $1,776 each to RNC, NRSC, and NRCC, $2,000 to a PAC, and $20,000 to a state-party-committee federal fund, all counting against the $70,800 limit.

McCutcheon challenges this biennial limit as unconstitutional, as applied to contributions to national-

party committees and facially. He wants to express his support for, and associate with, non-candidate committees as permitted by the base limits, 2 U.S.C. 441a(a)(1)(B)-(D), without biennial limits.

McCutcheon also challenges the biennial candidate-contribution limit, 2 U.S.C. 441a(a)(3)(A). He has given $33,088 in contributions to federal candidates and intends to give $21,312 more to federal candidates, for a biennial aggregate of $54,400, which he would do but for the $46,200 limit. He wants to express his support for, and associate with, candidates as permitted by the base limits without a biennial limit.

RNC, a national-party committee, challenges the $70,800 biennial limit on non-candidate contributions as unconstitutional, as applied to contributions to national-party committees and facially. RNC wants to receive the speech and association of McCutcheon and other contributors as permitted by the base limits without any biennial limit.

FEC is the agency with enforcement authority over the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. 431 et seq., and BCRA.

In the future, Plaintiffs-Appellants intend to do materially similar actions if not limited by biennial limits. Absent the requested relief, they will not proceed with their planned activities and will be deprived of their First Amendment rights and suffer irreparable harm. There is no adequate remedy at law.

On June 22, 2012, Plaintiffs filed their Verified Complaint, three-judge-court motion,[1] and preliminary-

---

[1] BCRA 403(d)(2) authorizes challengers of BCRA provisions to elect BCRA's judicial-review provisions, 116 Stat. at 114, which require a three-judge court, expedition, and direct appeal to this Court. BCRA 403(a); App.21a.

injunction motion. The three-judge court consolidated the preliminary-injunction motion with the merits and set a September 6 hearing. FEC moved for dismissal under Federal Rule of Civil Procedure 12(b)(6). On September 28, the court released an opinion (App.1a) and order (App.17a) granting FEC's motion to dismiss, dismissing the preliminary-injunction motion as moot, and entering final judgment for FEC on all counts. On October 10, Plaintiffs noticed appeal. App.18a.

The Questions Presented Are Substantial

Introduction

The substantial questions raised here involve core political expression and association and proper application of this Court's precedents to a challenge to biennial limits on contributions to candidates, parties, and PACs.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court rejected a *facial* challenge to a biennial-contribution limit based on an *anti-circumvention* analysis. *Id.* at 38 ("to prevent evasion of the [base] contribution limitation "). But that involved a statute since replaced by a scheme different in wording and statutory context. Post-*Buckley* base limits eliminated the anti-circumvention interest that *Buckley* said justified a "ceiling." And *Buckley*'s anti-circumvention analysis did not even suggest that contributions to *candidates* pose a cognizable circumvention concern.

Yet the court below dismissed challenges to the biennial limits (a) *as-applied* to limits on contributions to national-party committees and (b) on contributions to *candidates* for failing to state a claim. It did so though no anti-circumvention interest now justifies the limits.

And in its legal analysis it did not even mention the limit on contributions to candidates (for lacking a justifying interest), despite the unique nature of that challenge, and the important distinctions between the two claims.

The district court said that these issues are for this Court to decide. "Although we acknowledge the constitutional line between political speech and contributions grows increasingly difficult to discern, we decline Plaintiffs' invitation to anticipate the Supreme Court's agenda." App.7a. "To break the chain of legal consequences tied to th[e] fact [that the restricted contributions do not directly pay for speech] would require a judicial act we are not empowered to perform." App.9a. "Plaintiffs raise the troubling possibility that *Citizens United*[*v. FEC*, 130 S.Ct. 876 (2010),] undermined the entire contribution limits scheme, but whether that case will ultimately spur a new evaluation of *Buckley* is a question for the Supreme Court, not us." App.16a.

The challenged provisions fail under *existing* precedent, but if this Court finds that the case turns on *Buckley*'s expenditure-contribution scrutiny distinction, Appellants have preserved that issue and assert that the distinction is unconstitutional.

I.

The Biennial Limit on Contributions to Non-Candidate Committees Is Unconstitutional for Lacking a Cognizable Interest as Applied to Contributions to National-Party Committees.

Appellants challenge the $70,800 biennial limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), as unconstitutional (under First Amendment free-speech and -association rights) as applied to contributions to national-party committees for lacking

a cognizable interest.

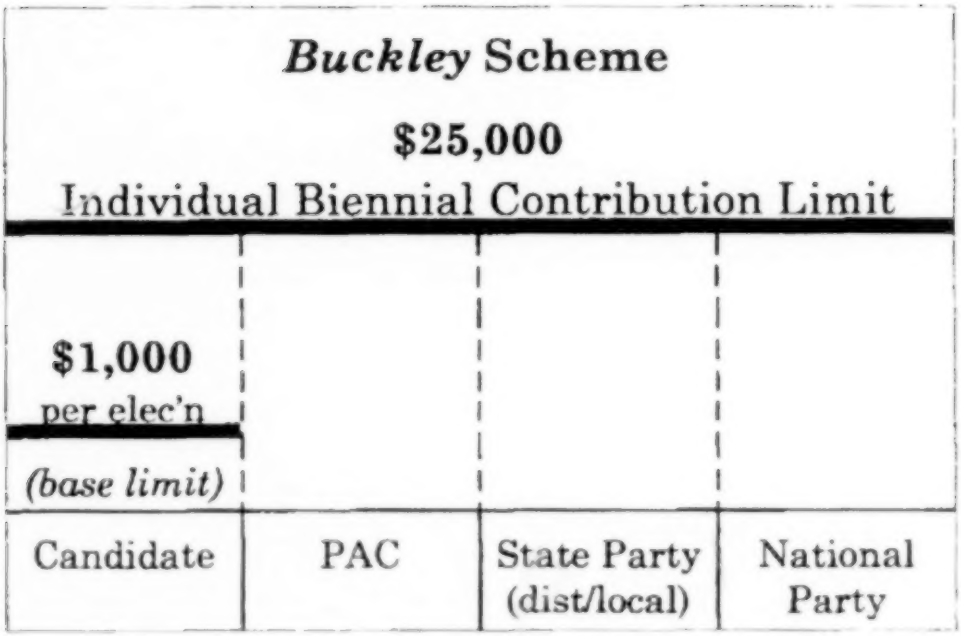
A. Strict Scrutiny Is Required Because the Biennial Limits Are in Essence Expenditure Limitations, Though Exacting Scrutiny Suffices for Appellants' Success.

Appellants argued below that strict scrutiny applies because the biennial limits are essentially expenditure limits, *see infra*, but that even under intermediate scrutiny the government failed to prove that the biennial limits are supported by the requisite anti-circumvention interest, and that, if this case hinges on scrutiny, *Buckley* must be overruled to the extent it applies lower scrutiny to contribution limits.

The district court says that Appellants "are wrong" in asserting that base limits make biennial limits essentially expenditure limits because "[t]he difference between contributions and expenditures is the difference between giving money to an entity and spending that money directly on advocacy." App.8a.

But that avoids Appellants' argument. It simply recites *Buckley*'s familiar expenditure-contribution distinction, which does not address *this* situation. The biennial limits do not limit any contribution to a *particular* entity or candidate, as do base limits. Rather, biennial limits restrict *how many* entities or candidates individuals may express their support for (expression) and associate with. That imposes a more serious burden than a base limit, so *Buckley*'s distinction does not address that burden.

And the biennial "ceiling" at issue in *Buckley did* function as a contribution limit, though BCRA's biennial limits *do not* function as contribution limits as is shown in *Buckley*-Scheme and BCRA-Scheme charts.

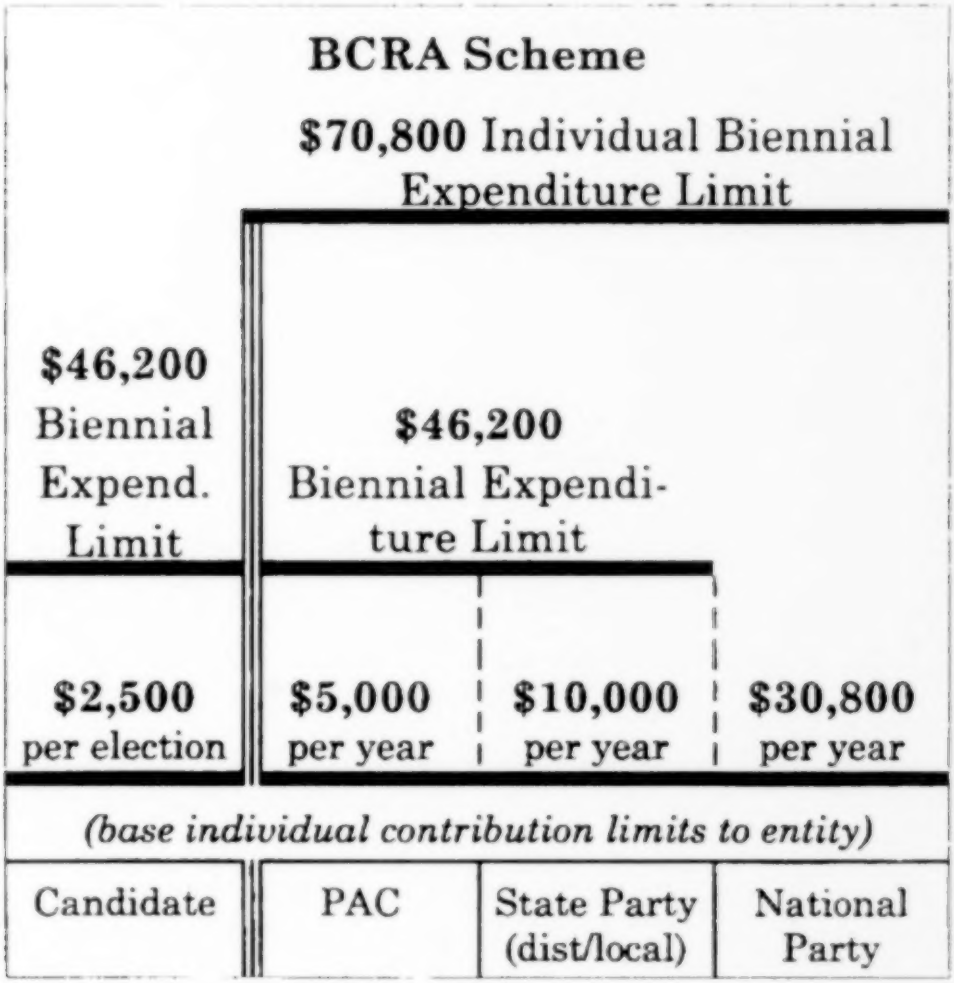


The *Buckley* Scheme had a base limit ($1,000) for contributions to candidates, but none for contributions to PACs or parties. So the biennial limit functioned as a base limit, restricting how *much* one could give to a party or PAC.[2]

But the BCRA Scheme layers biennial limits atop base limits. The base limits restrict *how much* an indi-

[2] The base limit was justified by a quid-pro-quo, *anti-corruption* interest because it involved a contribution to a particular candidate, *see Buckley*, 424 U.S. at 26 ("[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders"), which is the only situation in which a quid-pro-quo-corruption risk can arise. All limits on contributions to parties and PACs are based on an *anti-circumvention* interest, as are the biennial limits, *see Buckley*, 424 U.S. at 38 ("evasion of the . . . contribution limit[]"), because they do not involve contributions to candidates. The anti-circumvention interest arises where there is a cognizable risk of a conduit-contribution resulting from a contribution.

vidual may contribute to a candidate, PAC, or party. The biennial limits restrict *how many* entities an individual may express support for, or associate with, by making base-level contributions, i.e., how much one may *spend* on political expression and association as base-level contributions.



Because BCRA's biennial limits function in essence as expenditure limits, strict scrutiny applies. But even under exacting scrutiny, the heightened burden of BCRA biennial limits over the burden of base limits requires higher scrutiny than for ordinary base limits

because "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis v. FEC*, 554 U.S. 724, 744 (2008).

Under either scrutiny, there is a no-broader-than-necessary tailoring requirement. *See Buckley*, 424 U.S. at 25 (a restriction that is closely drawn must nonetheless "avoid unnecessary abridgement of associational freedoms"). *See also California Medical Association v. FEC*, 453 U.S. 182 (1981) (controlling opinion) ("*CMA*") (requiring "that contributions to political committees . . . be limited only if . . . limitation is no broader than necessary. . . .").

Under either scrutiny, "[w]hen Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy," *Citizens United*, 130 S.Ct. at 911.

Under either scrutiny, *Buckley*'s *anti-circumvention* interest must be proved by the government, i.e., that a cognizable *conduit-contribution* to a candidate can result from base-limit contributions, absent the biennial limits, given the layered prophylaxes enacted to eliminate circumvention. This burden cannot be met by broad-brush speculation about *corruption* (especially forbidden theories of corruption). The district court did not require the government to meet this burden.

B. *Buckley*'s Facial Upholding of the Now-Repealed "Overall $25,000 Ceiling" Does Not Control this Case, but *Buckley*'s Concerns Guide the Analysis.

"[FECA]'s contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. "[T]he First and Fourteenth Amendments guarantee freedom

to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses (t)he right to associate with the political party of one's choice." *Id.* at 15 (citations and citation marks omitted). "Making a contribution, like joining a political party, serves to affiliate a person with a candidate [or a political party]. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22.

Buckley rejected a facial constitutional challenge to an "overall $25,000 ceiling" on biennial contributions. *Id.* at 38. This holding does not control here because: that ceiling's statutory context was materially altered; the ceiling was repealed and replaced by BCRA's multiple biennial limits; and *Buckley* was a facial holding (so inapplicable to as-applied challenges). But the *concerns* on which *Buckley* relied to uphold the old ceiling control the analysis here, and those were promptly eliminated by Congress after *Buckley*. Key to the analysis is the fact that the 1974 FECA contribution-limits scheme considered in *Buckley* included only the following applicable contribution limits, *see Buckley*, 424 U.S. at 189:

- a $1,000 per election limit on contributions by a "person" to a candidate;
- a $5,000 per election limit on contributions by what would now be called a multi-candidate political committee to a candidate; and
- an individual, biennial overall $25,000 ceiling on total contributions.

That scheme lacked limits on contributions *to* political committees *other than* the "overall $25,000 ceiling" on total contributions. *Without* that ceiling, individuals could give unlimited amounts to political parties and

PACs. Also missing was a restriction on the proliferation of political committees controlled by single entities, which Congress installed shortly after *Buckley*. *Buckley* upheld the ceiling facially in that context, though the provision was "not . . . separately addressed at length by the parties," 424 U.S. at 38, with this limited analysis:

> The overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute *massive* amounts of money to a particular candidate through the use of unearmarked contributions *to political committees likely to contribute to that candidate*, or huge contributions *to the candidate's political party*. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.

Id. (emphasis added). Essential to this analysis is the Court's earlier highlighting of the political-committee-proliferation potential. *Id.* at 28 & n.31.

So the analytical keys to *Buckley*'s facial upholding were the potential for *circumvention* of the base limits on contribution to candidates by *massive* contributions *to the candidate's political party* and *to* a *proliferation* of *sympathetic PACs*. Congress promptly eliminated political-committee proliferation and massive contributions to political parties and PACs, removing the bases on which *Buckley* upheld the "overall $25,000 ceiling"

on contributions, as discussed next.

C. Congress Fixed the Problems that *Buckley* Identified.

In response to *Buckley*, Congress quickly enacted new base contribution limits, 2 U.S.C. 441a(a)(1), limiting large contributions *to* political parties and PACs to eliminate the possible circumvention risk identified by *Buckley*, as follows:

- a $1,000 per election limit on contributions by persons to a candidate;
- a (*new*) $20,000 per year limit on contributions by persons *to* a national-party committee;
- a (*new*) $5,000 per year limit on contributions by persons *to* other political committees;
- limits on contributions by a "multicandidate committee"[3] as follows—
  - $5,000 per election to a candidate,
  - (*new*) $15,000 per year *to* a national-party committee, and
  - (*new*) $5,000 per year *to* any other political committee; and
- the "overall $25,000 ceiling" on total individual biennial contributions.

See FECA Amendments of 1976, Pub.L.No. 94-283, 90 Stat. 475. And Congress eliminated the proliferation of political committees. *See infra* at 13-14. While eliminating *Buckley*'s reasons for upholding the "overall $25,000 ceiling," Congress retained it.

The $5,000 per year limit on contributions *to* a PAC was upheld in *CMA*, based on a circumvention risk.

---

[3] These limits are only for *multicandidate committees*. *See* 11 C.F.R.100.5(e)(3). Other committees would contribute as any other "person." 11 C.F.R. 100.5(e)(2).

453 U.S. at 197-99 (plurality); *id.* at 203 (Blackmun, J., concurring in part and in judgment). The plurality recited a Conference Report explaining that the 1976 amendments were to eliminate circumvention and political-committee proliferation:

> "The conferees' decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee, other than a candidate's committees, and to impose new limits on the amount a person or multicandidate committee may contribute to a political committee, other than candidates' committees, is predicated on the following considerations: first, *these limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate*; . . . and third, *these limitations minimize the adverse impact on the statutory scheme caused by political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign*."

CMA, 453 U.S. at 198 n.18 (emphasis added; citation omitted).

The Conference Report described the anti-proliferation rules in anti-circumvention terms thus:

> The anti-proliferation rules . . . are intended to prevent corporations, labor organizations, or other persons or groups of persons from evading the contribution limits . . . . Such rules are described as follows:
>
> 1. All of the political committees set up by a single corporation and its subsidiaries are treated as a single political committee.
>
> 2. All of the political committees set up by a single international union and its local unions are

treated as a single political committee.

3. All of the political committees set up by the AFL-CIO and all its State and local central bodies are treated as a single political committee.

4. All the political committees established by the Chamber of Commerce and its State and local Chambers are treated as a single political committee.

5. The anti-proliferation rules stated also apply in the case of multiple committees established by a group of persons.

H.R.Rep.No. 94-1057, at 58.

Thus, Congress eliminated the concerns on which *Buckley* relied to facially uphold the old "ceiling." A contributor cannot give "massive" amounts of money *to* a party or PAC. Political-committee proliferation is gone. There is no cognizable circumvention risk.

D. In BCRA, Congress Repealed and Replaced the "Overall $25,000 Ceiling" with Multiple Biennial limits.

The challenged biennial limits were enacted as BCRA § 307(b), 116 Stat. 102-03, repealing the old ceiling and replacing it with separate biennial contribution limits. See App.20a (text of 2 U.S.C. 441a(a)(3)). So *Buckley*'s facial upholding of the old ceiling does not control here. And the new limits are no more justified than the old ceiling after the 1976, post-*Buckley*, FECA amendments.

E. The $70,800 Biennial Limit Lacks a Cognizable Interest as Applied to Contributions to National-Party Committees.

The $70,800 biennial limit on contributions to non-candidate committees at 2 U.S.C. 441a(a)(3)(B) is unconstitutional as applied to national-party committees.

1. No Anti-Corruption Interest Applies.

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative PAC*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). Corruption is strictly defined: "Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 497. *Citizens United* reaffirmed that corruption involves only quid-pro-quo corruption, rejecting influence, access, gratitude, and leveling the political playing field as cognizable corruption. 130 S.Ct. at 909-12. *See also Arizona Free Enterprise PAC v. Bennett*, 131 S.Ct. 2806, 2821 (2011) (rejecting equalizing interest); *Davis*, 554 U.S. at 742 (same).

The anti-corruption interest does not apply to contributions to national-party committees because "[t]his anticorruption interest is implicated by contributions to *candidates*." *EMILY's List v. FEC*, 581 F.3d 1, 6 (D.C. Cir. 2009)) (emphasis in original). Cognizable quid-pro-quo corruption is based on a *financial* benefit to a *particular candidate* in such a "large" amount, *Buckley*, 424 U.S. at 26 (anti-corruption interest triggered by "large contributions"), as to cause a candidate "to act contrary to [his or her] obligations of office," *Citizens United*, 130 S.Ct. at 497. National-party committees are not candidates.

National-party committees pose no cognizable corruption risk to their candidates. "We are not aware of any special dangers of corruption associated with political parties . . . ." *Colo. Republican Fed. Camp'n Comm.*

v. FEC, 518 U.S. 604, 616 (1996) ("Breyer, J., joined by O'Connor & Souter, JJ.) ("*Colorado-I*"). Moreover,

> [a]s applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force. . . . What could it mean for a party to "corrupt" its candidate or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute "a subversion of the political process."

Id. at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment and dissenting in part) (citations omitted). Thus, in *Colorado-I* an anti-corruption interest could not be used as a basis to prohibit political-party-committee independent expenditures, and here it cannot be used to limit contributions to national-party committees.

2. No Anti-Circumvention Interest Exists.

While "preventing corruption" is the only cognizable interest "for restricting campaign finances." *NCPAC*, 470 U.S. at 496-97, this Court has recognized a *prophylactic* interest in preventing *circumvention* of the contribution limits that eliminate the quid-pro-quo risk. This anti-circumvention interest is the interest that justifies limits on contributions to parties and PACs and on how much candidates may contribute to other candidates. Does an anti-circumvention interest justify the biennial limits as applied to contributions to national-party committees?

(a) The Anti-Circumvention Interest and Remedy Are Limited in Scope.

The anti-circumvention interest must be limited,

just as the anti-corruption interest is limited. Because the anti-circumvention interest is derivative and prophylactic, there must be a viable quid-pro-quo-corruption risk to begin with. Since *Buckley* held that only "*large* contributions" trigger a quid-pro-quo-corruption risk, 424 U.S. at 26 (emphasis added), there is no cognizable conduit concern justifying biennial limits unless it is possible to "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party," *id.* at 38. If the ability to do this is eliminated by one prophylaxis, there remains no justification for an additional prophylaxis. This is clear from the prohibition on layering "prophylaxis-on-prophylaxis" articulated in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007) (Roberts, C.J., joined by Alito, J.) (controlling opinion) ("*WRTL-II*"). *WRTL-II* held that the "prophylaxis-on-prophylaxis approach" . . . is not consistent with strict scrutiny." *Id.* Neither is it consistent with the requirement that any "limitation [be] no broader than necessary," *CMA*, 453 U.S. at 203 (controlling opinion), and "avoid unnecessary abridgement," *Buckley*, 424 U.S. at 25.

(b) *Buckley* Requires Examination of the Potential for Political-Committee Proliferation, "Massive" Contributions, and Conduit Capability.

Does a cognizable anti-circumvention interest justify the biennial limit as applied to national-party committees? This requires returning to *Buckley*, which said the ceiling could "prevent *evasion* [circumvention] of the $1,000 contribution limitation by a person who

might otherwise contribute *massive* amounts of money to a particular candidate through the use of unearmarked contributions *to political committees likely to contribute to that candidate*, or huge contributions *to the candidate's political party*." *Id.* (emphasis added). This was premised on possible political-committee proliferation. *Id.* at 28. So in searching for a circumvention risk, *Buckley* requires us to consider three questions of the *current* campaign-finance scheme: (a) Is *political-committee proliferation* possible?; (b) Can *massive contributions* be made *to* parties and PACs?; and (c) Are political committees *now capable of serving as conduits* for transmitting massive contributions to candidates?

(c) Congress Imposed a *Political-Committee-Proliferation* Prophylaxis.

Can an individual give massive contributions to a *proliferation* of political committees? No. Committee proliferation by the same entities has been eliminated. *See supra* at 13-14.

(d) Congress Imposed a *Massive-Contribution* Prophylaxis.

Can an individual make *massive* or *huge* contributions to a party or PAC? No. Individuals may give $30,800 per year to a national-party committee; $10,000 per year to a state-party committee (combined limit); $5,000 per year to a PAC; and $2,500 to a candidate per election. *See supra* at 2. None of these is "massive" or "huge" because *Buckley* said the "overall $25,000 ceiling" *prevented* such large contributions. 424 U.S. at 38. Adjusted for inflation, $25,000 in 1974 is worth $116,676 as of June 2012.

Congress made the judgment that each of these base limits eliminates any cognizable circumvention

risk as to the entity to which the limit applies, e.g. giving $30,800 per year eliminates any cognizable circumvention risk as to a contribution to RNC. Doing something that poses a noncognizable risk multiple times does not create a cognizable risk. Zero multiplied by anything equals zero. If there is no cognizable circumvention risk in giving $30,800 to RNC, NRSC, or NRCC, then there is no cognizable circumvention risk in giving that amount to all of them in a year or to each per year in a biennium. Thus, there is no anti-circumvention justification for a biennial limit.

Congress instituted another prophylaxis against massive funds to political parties by banning "soft money." This was upheld because, as *McConnell* said, "[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." 540 U.S. at 145. *Citizens United* rejected influence, access, and gratitude as cognizable corruption beyond the soft-money context, 130 S.Ct. at 909-10, but the ban remains another prophylaxis preventing "massive" funds going to political party committees.

Buckley's circumvention concern was based on the movement of large amounts of money from individuals to political parties and PACs without limits. 424 U.S. at 38. This is now impossible because of prophylaxes preventing it.

(e) Congress Imposed an *Anti-Conduit* Prophylaxis by Many Prophylaxes.

Are political committees *now capable of serving as conduits* for transmitting massive contributions to candidates? No. By the foregoing prophylaxes, and others sketched below, Congress has imposed an *anti-conduit* prophylaxis.

A base limit on contributions to candidates is *itself* a prophylactic measure because there is no inherent wrong in a large contribution to a candidate, only in quid pro quo, and a limit is designed to prevent the quid-pro-quo-corruption risk. Laws criminalizing bribery and requiring contribution disclosure are also prophylaxes, as are laws involving earmarking and false-name contributions. Earmarked contributions through an intermediary are deemed contributions from the original contributor. 2 U.S.C. 441a(a)(8).[4] False-name contributions are barred. 2 U.S.C. 441f. So any effort to pass contributions to a candidate through a party or PAC must be done in one's own name and subject to one's own limit or the effort is illegal.

But can there *be* any cognizable circumvention risk from truly *un*earmarked contributions? Obviously, an *un*earmarked contribution *to* a political party committee or a PAC is not a contribution "*to* a particular candidate," as *Buckley* suggested, 424 U.S. at 3[illegible] (emphasis added), though an earmarked contribution is a contribution to a candidate. Unearmarked contributions are "to" the recipient party or PAC. *See, e.g., id.* at 23 n.24. Nonetheless, *Buckley*'s conduit concern was that "a person . . . might otherwise [absent the "ceiling"] contribute massive amounts of money to a particular can-

---

[4] "Earmarking" includes understandings of all sort about the use of a contribution, not just, e.g., those reduced to formal agreement in writing. FEC counts a contribution to a party committee against a "contributor's contribution limit for a particular candidate" where the contributor "retains control" (as by earmarking) or where "contributor[s] know[] that a substantial portion of [their] contribution will be given to or spent on behalf of a particular candidate." FEC, *Political Party Committees* at 15 (July 2009).

didate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Id.* at 38. Giving "massive" sums "to a candidate" by such means could only result if parties and/or PACs decided, without being required to do so (absent earmarking), to *contribute* to a specific candidate.[5] But even in *Buckley*'s time, political committees could only contribute $1,000 or $5,000 (for what would now be called multi-candidate committees) per election to a candidate. So the idea that "massive" contributions from a particular contributor could reach a particular candidate by means of unearmarked contributions to a party and/or PAC was remote. The recited possibility necessarily turned on "huge" sums to parties or PACs, presumably increasing the chance that a base-level contribution will be made to a particular candidate, and on political-committee proliferation. Otherwise, nothing approaching "massive" sums could ever get to a candidate. But "huge" contributions to parties and PACs have been eliminated since *Buckley*, along with the proliferation problem. So without earmarking, there is no cognizable conduit concern.

Without earmarking, there is no way to *assure* that *any* of the money one contributes to a political committee will ever make it to a particular candidate as a contribution. *Buckley* addressed this long-odds problem, absent any evidence, by suggesting one might contribute "to political committees *likely* to contribute to that candidate[] or . . . *the candidate's political party*." 424 U.S. at 38 (emphasis added). Especially as applied to

---

[5] This conduit concern cannot be about independent *expenditures* because the independence eliminates cognizable benefit to a candidate. *Citizens United*, 130 S.Ct. at 908.

national-party committees, which support numerous candidates and have numerous monetary demands, any conduit concern with unearmarked funds is either non-existent or so minuscule as to be noncognizable. The PAC most "likely to contribute to [a] candidate," *id.*, would be a single-candidate PAC (which can receive a contribution of $5,000 per year and contribute $2,500 per candidate), not a multi-candidate committee (which can receive $5,000 per year and contribute $5,000 per candidate). So trying to contribute "to" a candidate through a party or PAC without earmarking is uncertain, inefficient, and unlikely to succeed— impossible in any cognizable amount—making it more likely that a would-be "massive" contributor would simply spend the money on independent expenditures supporting the candidate or contribute earmarked funds to an IE-PAC for independent expenditures favorable to the candidate.

Even if a contributor's unearmarked contribution to a political committee could somehow be attributed to a political-committee contribution to a candidate, it only would be *attributable on a pro-rata basis* because unearmarked contributions become a fungible part of all contributions received (which in turn are added to funds carried over from prior election cycles). Consider if a contributor gives $30,800 in 2011 and 2012 to RNC, totaling $61,600. As a share of RNC's contributions received, $61,600 is a minuscule amount. Such a pro-rata share must be applied to any national-party committee contribution to a candidate to determine the contributor's share of the contribution. And since the limits on contributions to national-party committees and by them to candidates already eliminate any circumvention risk, a contributor's minuscule share of any contribution to a candidate is noncognizable as a

governmental interest justifying biennial limits, which are thus meaningless prophylaxes on prophylaxes.[6]

Even if numerous contributors try to use a political committee as a conduit to get pro-rata contributions to a candidate, there is the barricade of the limit on contributions *to* a candidate. For example, if a $5,000 per candidate per election contribution *has already been made* by a party, then no matter how many contributors give in the hope of triggering a contribution to the candidate, no more can go to the candidate.[7] The limits on contributions *to* and *by* political committees eliminate any cognizable circumvention risk.[8]

The foregoing shows that there are no "massive" contributions to parties or PACs to begin with, and the contributor's pro-rata share of any contribution to a party or PAC and of any party's or PAC's contribution to a candidate are noncognizable as circumvention because of existing base limits absent the biennial limits. From this review of *Buckley*'s conduit concerns as applied, it is clear that Congress has created prophylaxes

---

[6] This pro-rata analysis also applies to multicandidate PACs, which must have at least 51 contributors and must contribute to 5 or more candidates, for reasons that can be shown in subsequent briefing.

[7] Also if a national party has met its contribution limit under 2 U.S.C. 441a(h), no more can be given.

[8] In addition to the permitted $5,000 per-candidate per-election contribution limit, a political party's national committee has spending authority for expenditures coordinated with candidates. 2 U.S.C. 441a(d). But any anti-circumvention interest is already addressed by the limit on this coordinated spending. *See FEC v. Colo. Republican Fed. Camp'n Comm.*, 533 U.S. 431, 452 (2001) (expenditure limit "target[s]" circumvention concern) ("*Colorado–II*").

on prophylaxes that have eliminated *Buckley*'s concerns. *See* 424 U.S. at 38. Because *Buckley*'s conduit concern is already amply addressed *without* the biennial limits, there remains no justification for the $70,800 biennial limit on contributions to national-party committees. This limit is a vestigial appendage lacking constitutional justification. It is simply layering prophylaxis on prophylaxes without justification and in a manner broader than necessary to address the expressed circumvention concern.[9]

3. The Challenged Limit Relies on an Unconstitutional Equalizing Interest.

Because the biennial limit as applied is not justified by any anti-circumvention interest, it serves only to level the playing field, limiting persons who could give a biennial total of $184,800 to three national-party committees (under base limits) to $70,800. This Court has repeatedly rejected any equalizing interest. *See, e.g.*, *Buckley*, 424 U.S. at 48-49, 57.

4. The District Court Ignored the Required Conduit-Contribution Analysis and Considered Non-Cognizable Interests.

The district court's constitutional analysis is broad-brush, lacking the precision required where core political speech and association are substantially burdened.

It fails to make the necessary distinction between the anti-corruption and anti-circumvention interests. The former applies to limits on direct contributions to

---

[9] Congress's assertion of an anti-circumvention interest is underinclusive because PACs have no biennial aggregate limit. Multi-candidate PACs, as deeply interested in legislative outcomes as individual contributors, may contribute $5,000 to as many candidates as they can afford. *Cf. Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002).

candidates, where the quid-pro-quo-corruption risk is possible. The latter applies to biennial limits, *Buckley*, 424 U.S. at 38, and asks whether a contribution poses a conduit-contribution risk, i.e., whether there is a cognizable risk that base-level contributions will result in a cognizable contribution to a candidate, absent the biennial limits.

The court's failure to employ this required analysis leads to its error of considering non-cognizable interests, including corruption and forbidden theories of corruption. As shown above, there is no cognizable risk that any contribution restricted by the biennial limits poses a cognizable conduit risk, due to layers of prophylaxes, especially the post-*Buckley* FECA amendments—and the government has proved no such risk.

The court ignored these prophylaxes and their individual and cumulative effects by "conceiv[ing] of the contribution limits as a coherent system rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis." App.13a. But that is neither precise First Amendment analysis nor the way of *Buckley*, which considered each limit individually and asked whether it was justified under the proper scrutiny. *See, e.g.*, 424 U.S. at 23-51. Nor was it the way of *Citizens United*, which systematically and carefully considered each proffered interest before striking down the corporate independent-expenditure ban. 130 S.Ct. at 909-11. Had the court employed the proper analysis, it would have been compelled to a different outcome because the government failed to prove a conduit-contribution risk from base-level contributions absent biennial limits.

The court's handling of cognizable governmental interests is erroneous—even beyond its looking to an

anti-corruption risk. Though *Citizens United* expressly limited corruption to quid-pro-quo corruption, the court tries to show that *Citizens United* included in corruption "a wheeling-and-dealing space" beyond true quid-pro-quo dollars for votes, citing a portion of *Citizens United* that was not trying to establish the scope of corruption (which had already been done). App.10a. While acknowledging that large contributions "do[] not ipso facto" create corruption, *id.*, the court relies heavily on the ability to "give half-a-million dollars in a single check to a joint fundraising committee," App.12a. This is a sub silentio reliance on the forbidden equalizing interest. And though the court acknowledges that "[g]ratitude . . . is not itself a cognizable form of corruption," App.12a, it relies precisely on the prospect of a candidate "lay[ing] the wreath of gratitude" before the writer of a large check at a joint fundraiser—without demonstrating that any cognizable conduit-contribution has made its way through the many prophylaxes to that candidate.

The court imagines that "the parties implicitly agree" to a conduit contribution. App.12a. But if they *agree*, the contribution is *earmarked* and governed by the same limits as any other contribution by a contributor to the candidate. Exceeding those limits is illegal. So the court's posited mechanism for circumvention relies on individuals violating the law. It is a flawed analysis that upholds one provision (the biennial limits) on the presumption that people will violate another (the earmarking rules).

The court couples a concern with an illegitimate interest (gratitude) with an illegal scheme (violating earmarking rules) to create a supposedly cognizable hybrid interest. App.12-13a. But no such interest has been recognized. One cannot create cognizable inter-

ests by mating rejected interests. Moreover, *Buckley*'s upholding of the "overall $25,000 ceiling" was premised precisely on "the use of unearmarked contributions" for circumvention. 424 U.S. at 38.

Instead of requiring the government to meet its burden of showing how a base-level contribution can result in a cognizable conduit-contribution to a particular candidate absent the biennial limits, the court relies on *speculation* (based on flawed premises, *supra*). This appears in two key passages.

First, the court says it "cannot ignore the ability of aggregate limits to prevent evasion of the base limits," App.11a, for which it cites as an example the ability of party committees to transfer funds, App.12a. But contributions to and by parties are subject to limits enacted to eliminate (or make non-cognizable) circumvention, and the ability of parties to transfer funds does not alter that. The court fails to *show* any cognizable risk that transfers can result in any cognizable conduit-contribution, saying instead that a "half-a-million dollar contribution *might* . . . find its way to a single committee's coffers," which might make a coordinated expenditure. App.12a. (emphasis added). Aside from "might" being speculation, the limit on coordinated party expenditures is already in place to address the government's anti-circumvention interest. *See Colorado-II*, 533 U.S. at 452 (expenditure limit "target[s]" circumvention concern).

Second, the court says that "it is *not hard to imagine* a situation where the parties implicitly agree to such a system," i.e., where "many separate entities would willingly serve as conduits for a single contributor's interests." App.12a. (emphasis added). The implicit-agreement-as-earmarking problem has been

addressed above, i.e., it constitutes a *contribution*. The it-is-not-hard-to-imagine analysis is speculation, not reliance on facts proven by the FEC, and has no place in First Amendment analysis. And this imagination is premised on people violating earmarking laws. Finally, the court ignores the uniqueness of the candidate-committee claim, sweeping it into the court's flawed broad-brush analysis. *See* Part IV. The district court's opinion is improper First Amendment analysis.

The first question presented is a substantial question that this Court should decide.

II.

The Biennial Limits on Contributions to Non-Candidate Committees Are Unconstitutional Facially for Lacking a Constitutionally Cognizable Interest.

Appellants challenge the biennial limits ($70,800 and $46,200) on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), as facially unconstitutional under the First Amendment. As noted in Part I, the post-*Buckley* FECA amendments eliminated the two bases on which *Buckley* relied, 424 U.S. at 38, to facially uphold the old "ceiling," i.e., there can no longer be either political-committee proliferation or the risk of circumvention of contribution limits by contributing "massive" amounts of money to parties or PACs. Thus, there is no cognizable interest to justify these biennial limits as applied to *any* non-candidate committees, so they are *facially* unconstitutional.

Because of the lacking interest, these biennial limits are facially unconstitutional for being substantially overbroad under the analysis of *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). This Court is justified in "prohibiting all enforcement" of the limits be-

cause their application to protected speech and association is substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia* v. *Hicks*, 539 U.S. 113, 119-20 (2003). The unconstitutional application of 2 U.S.C. 441a(a)(3)(B) to all national-party committees is substantial, not only in an absolute sense, but also in a relative sense, especially because there is no "scope of . . . plainly legitimate applications" due to the lack of legitimate application to state-party committees and PACs, as set out in the preceding paragraph.

Because the $46,200 sub-limit on contributions to non-national-party committees is an integral part of 2 U.S.C. 441a(a)(3)(B), because Congress thereby indicated its intention that the provision operate as a unit, and because the sub-limit is dependent grammatically on the whole of 441a(a)(3)(B) for its meaning, this sub-limit must fall facially with the whole provision.

The district court rejects this argument because it finds that the biennial limits are constitutional as applied to national-party committees, App.13a, but as argued above, that is erroneous.

The second question presented is a substantial question that this Court should decide.

III.

The Biennial Limits on Contributions to Non-Candidate Committees Are Unconstitutionally Too Low, as Applied and Facially.

Appellants challenge the limits on contributions to non-candidate committees at 2 U.S.C. 441a(a)(3)(B) as unconstitutional for being too low, as applied to national-party committees and facially, under *Randall v. Sorrell*, 548 U.S. 230 (2006). *Randall*'s analysis rejects contribution limits "fail[ing] to satisfy the First

Amendment's requirement of careful tailoring" by "impos[ing] burdens upon First Amendment interests that (when viewed in light of the statute's legitimate objectives) are disproportionately severe." *Id.* at 237 (plurality).

McCutcheon's contributions to non-candidate committees in this biennium total $27,328, and, if he is permitted to exceed the $70,800 biennial limit by contributing $25,000 each to RNC, NRSC, and NRCC, his total biennial contributions to non-candidate committees would total $97,000. The current biennial limit on contributions to non-candidate committees (national-party committees, state-party committees, and PACs) is $70,800, of which no more than $46,200 may go to non-national-party committees. 2 U.S.C. 441a(a)(3)(B).

In *Randall*, this Court struck as too low a $400 limit on contributions an individual may make, in a biennium, to a state-party committee. 548 U.S. at 262 (plurality opinion). The state-party committee in *Randall* needed funds to reach the voters in a population of 621,000, *see id.* at 250 (Vermont population in 2006). Applying *Randall*'s analysis to the $70,800 biennial limit as applied to national-party committees shows its unconstitutionality. RNC, NRSC, and NRCC need funds to reach the voters in a population of over 308,000,000, *see* http://2010.census.gov/2010census/data/ (2010 U.S. population 308,745,538). A ratio shows that contributions of $198,389.69 over two years to the national committees of one political party—RNC, NRSC, and NRCC—would still be too low under *Randall*. ($400/621,000 = $198,389/308,000,000). The $30,800 per national-party committee per year that individuals are permitted to give under 2 U.S.C. 441a(a)(1)(B) would result in $184,800 to the party committees per biennium. This $184,000 is much

closer to the $198,389 ratio derived from *Randall*. But the national-party committees cannot accept these otherwise legal amounts because of the $70,800 biennial limit, which is far too low to be constitutional. The biennial limit frustrates individuals' right to meaningfully associate with the national committees of their political party and to fund robust political discussion at the full base-level limits.

This $70,800 biennial limit is also facially unconstitutional as too low because it is substantially overbroad under *Broadrick*, 413 U.S. at 613. This $70,800 limit applies to national-party committees, state-party committees (also district- and local-party committees), and PACs. This Court is justified in "prohibiting all enforcement" of the limit because its application to protected speech and association is substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Hicks*, 539 U.S. at 119-20. Its unconstitutional application to all national-party committees is substantial, not only in an absolute sense, but also in a relative sense.

Because the $46,200 sub-limit on contributions to non-national-party committees is an integral part of 2 U.S.C. 441a(a)(3)(B), because Congress thereby indicated its intention that the provision operate as a unit, and because the sub-limit is dependent grammatically on the whole of 441a(a)(3)(B) for its meaning, this sub-limit must fall facially with the whole provision.

The district court rejected this challenge, in part because "individuals remain able to volunteer, join political associations, and engage in independent expenditures." App.15a. But the idea that alternative means of expression and association fix unconstitutional provisions is erroneous. *See, e.g.*, *WRTL-II*, 551 U.S. at 477

n.9 (controlling opinion).

The third question presented is a substantial question that this Court should decide.

IV.

The Biennial Limit on Contributions to Candidates Is Unconstitutional for Lacking a Constitutionally Cognizable Interest.

McCutcheon challenges the $46,200 biennial limit on contributions to candidates, 2 U.S.C. 441a(a)(3)(A), as unconstitutional for lacking a constitutionally cognizable interest to justify it. This limit bans him from associating with all the candidates of his choosing with full-base-level contributions.[10]

The district court does not even address this challenge. This is erroneous because this challenge and the one to the biennial limit restricting national-party committees differ in key ways, as highlighted below. The two challenges do not rise and fall together. In fact, the case against the $46,200 limit on contributions to candidates is even stronger than the powerful case against the $70,800 limit (on contributions to national-party committees) because *Buckley* did not even suggest that contributions to candidates might serve as a potential conduit for circumvention, though it did suggest that parties and PACs might have done so (under the *Buckley* Scheme). *See* 424 U.S. at 38.

Strict scrutiny should apply for reasons stated in Part I.A, but exacting scrutiny suffices for McCutcheon to prevail because the government has failed to prove a cognizable risk that a base-level contribution to a

---

[10] Even candidates who do not represent McCutcheon's home district or state have a direct effect on him, so he has an interest in races elsewhere.

candidate can result in a cognizable conduit-contribution absent biennial limits.

Though an anti-corruption interest may justify *base* limits on contributions to a candidate, *see, e.g.*, *Buckley*, 424 U.S. at 26-28, it does not justify the *biennial* limit because the latter does not apply to any contribution to a *particular* candidate (essential to a cognizable quid-pro-quo-corruption risk).

The biennial limit is not supported by an anti-circumvention interest, the only cognizable interest. *Id.* at 38. *Buckley* did not even suggest that the old "ceiling" might be justified by the use of candidates as conduits, though it suggested that parties and PACs might be conduits. *Id.* No "massive" funds could be channeled through candidate committees because candidate committees were "persons" limited to contributing $1,000 per election to candidates or candidate's committees under the FECA scheme that *Buckley* considered. Consequently, contributions to candidate committees could not pose any possibility of circumvention by "massive" contributions to candidate committees that might somehow benefit other candidates. And there was no candidate-committee proliferation problem because each candidate had only one principal-campaign committee, *id.* at 187, and contributions to any authorized candidate committee were deemed made to the candidate, *id.* at 189-90. So *Buckley*'s concerns in upholding the old ceiling simply did not exist with respect to individuals' contributions to candidates.

This remains true because individuals now may contribute only $2,500 per candidate per election, *see supra* at 2, and candidate committees may contribute only $2,000 per candidate per election to other candidates. 11 C.F.R. 102.12(c)(2). Moreover, "[a]ll autho-

rized committees of the same candidate for the same election to Federal office are affiliated," 11 C.F.R. 100.5(g)(1), so there is no proliferation.

Yet in BCRA, Congress acted as if the circumvention risk somehow had *increased* by restricting what contributors could do in three ways.

First, it failed to properly adjust for inflation from the 1974 FECA scheme that *Buckley* considered. The old $1,000 limit on a person's contribution to a candidate is now worth $4,667, not the current $2,500 limit, and in 1974, if an individual wanted to give his whole "overall $25,000 ceiling" to candidates, that ceiling is now worth $116,676, not the $46,200 limit now allowed for contributions to candidates.

Second, BCRA decreased the number of candidates with which a contributor may associate at the maximum base contribution level ($25,000/$1,000 versus $46,200/$2,500).

Third, Congress isolated candidate contributions in BCRA's biennial limits by giving them their own limit ($46,200) that is not dependent on what an individual contributed to non-candidate committees. 2 U.S.C. 441a(a)(3). Thus, Congress decided that giving solely to candidates poses an anti-circumvention interest. This is unlike the "overall $25,000 ceiling" on *all* contributions that was facially upheld in *Buckley*, *see* 424 U.S. at 38, which included contributions to candidates, parties, and PACs in one ceiling. Thus, there can be no argument now that this biennial limit is analytically part of an anti-circumvention package with contributions to party committees and PACs. Rather, this $46,200 limit must be justified solely on the basis that the government can establish a clear anti-circumvention interest as applied to individual contributions to

candidate committees. Thus, the district court's decision to treat "the contribution limits as a coherent system," App.13a, fails particularly regarding the biennial limit on contributions to candidates, which Congress isolated and which thus must stand on its own without regard to other limits and which the court could not ignore as if it were interdependent with other biennial limits.

Congress and now FEC have failed to justify these changes by explaining how there is a greater circumvention risk now than in 1974. There was no risk then, and there is no greater risk now.

It strains credulity to suggest that officeholders desire so little the hard-money funds they receive from individuals that they would forward them on to another candidate and credit the original, individual contributor. The more likely scenario is that the officeholder would credit *himself* with the $2,000 in support and not credit the initial individual contributor at all. After all, leadership PACs, which are non-connected committees controlled by an officeholder, exist to propel the officeholder into leadership positions, not to credit the initial, individual contributors that in turn fund leadership PAC contributions to other candidates. Bundlers of campaign contributions also exist. *See* 2 U.S.C. 441a(a)(8); 11 C.F.R. 110.6. But bundling aggrandizes the bundler not the individuals who make $2,500 contributions via the bundler.

This is true even absent earmarking, though earmarking contributions to a candidate via another officeholder's authorized committee is already illegal, 2 U.S.C. 441a(a)(8) and 441f. Individuals even suggesting that the first officeholder forward $2,000, *see* 2 U.S.C. 432e(3)(B), of the original $2,500 contribution,

see 2 U.S.C. 441a(a)(l)(A), to another candidate violate the earmarking prohibition. Moreover, even if candidate committees could be deemed conduits absent earmarking, the $2,000 contribution limit raises no cognizable circumvention (or corruption) concerns. If used to support a Senate candidate running statewide, $2,000 is only five times greater than the $400 limit struck down in *Randall* six years ago as too low to further a statewide campaign in Vermont. *Randall*, 548 U.S. at 253, 261-62. And "Vermont is about one-ninth the size of Missouri." *Id.* at 251.

Finally, this biennial limit is directed at a noncognizable anti-distortion interest, as demonstrated by simple arithmetic. In 2006, this Court held that a $200-per-election limit on contributions to Vermont statewide candidates was unconstitutionally low. *Randall*, 548 U.S. at 249, 262-63. Vermont's 2004 population was 621,000, *id.* at 250, well below the 646,947[1] population of the average congressional district. In 2006, the biennial limit was $40,000. If an individual wanted to make a contribution of equal value to one candidate of his choice in all 468 federal races that year (435 House races, 33 Senate races, and the presidential race), in order to comply with 2 U.S.C. 441a(a)(3)(A), he would have been limited to $85.29 per candidate for the entire 2006 election cycle, i.e., $42.64 per primary and general election. That is far below the $200 limit struck in *Randall*. In the 2012 biennium, with a $46,200 limit, McCutcheon is limited to $98.71 per candidate for the entire cycle (468 races). This is $49.35 per election (though thirty-three are statewide races for Senator, with on-average 8.7 times the number of persons needed to be reached in a congressional

[1] Dividing the 2000 U.S. population, 281,421,90, by 435.

campaign). Aside from being too low under *Randall*, *see infra* Part V, considering that $49.35 is $2,450.65 less than the per-candidate limit Congress itself deems permissible, it is clear that the aggregate limit furthers only the anti-distortion goal, an illegitimate government purpose.

In sum, because the biennial limit on candidate contributions at 2 U.S.C. 441a(a)(3)(A) is unsupported by any cognizable government interest, it fails constitutional scrutiny at any level of review.

The fourth question presented is a substantial question that this Court should decide.

V.

The Biennial Limit on Contributions to Candidates Is Unconstitutionally Too Low.

McCutcheon challenges the biennial limit on contributions to candidates at 2 U.S.C. 441a(a)(3)(A) as unconstitutionally too low. The reasons set out above at the end of Part IV demonstrate the unconstitutionality of this limit. Because the limit prevents McCutcheon from meaningfully associating with all the candidates of his choice at the base-level amount, it is too low and improperly tailored under the First Amendment. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 397 (2000) (whether contribution "limitation [is] so radical in effect as to render political association ineffective . . . or pointless").

The fifth question presented is a substantial question that this Court should decide.

Conclusion

For the foregoing reasons, this Court should note probable jurisdiction.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/235-3685 facsimile
jboppjr@aol.com
Counsel for Appellants

Stephen M. Hoersting
Dan Backer
DB CAPITOL STRATEGIES, PLLC
Suite 2109
209 Pennsylvania Ave., SE
Washington, DC 20003

Jerad Wayne Najvar
NAJVAR LAW FIRM
1 Greenway Plaza, Ste.100
Houston, TX 77046
Of Counsel for McCutcheon

October 26, 2012

Appendix

[Doc. 26, filed September 28, 2012]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAUN MCCUTCHEON, *et al.*, *Plaintiffs*, v. FEDERAL ELECTION COMMISSION, *Defendant*.	Civil Action No. 12cv1034(JEB)(JRB)(RLW) Three-Judge Court

Before BROWN, Circuit Judge; WILKINS, District Judge; and BOASBERG, District Judge.

MEMORANDUM OPINION

BROWN, Circuit Judge:

Congress enacted the Federal Elections Campaign Act of 1971 (FECA) to "promote fair practices in the conduct of election campaigns for Federal political offices." Pub. L. No. 92–225, preamble, 86 Stat. 3, 3 (1972). Since 1972, the law has changed significantly. The current iteration of FECA imposes contribution limits stratified to track both the identity of the contributor and the identity of the receiver. Individuals, however, cannot necessarily contribute as much as they might wish within these limits; they, and only they, must comply with a second regulatory tier: a set of aggregate contribution limits. 2 U.S.C. § 441a(a)(3). Plaintiffs Shaun McCutcheon and the Republican National Committee ("RNC") now challenge these aggregate limits as unconstitutional. We reject their challenge.

I. Background

A. Legal Background

In 1974, Congress amended FECA to prohibit persons from contributing more than $1,000 to any political candidate, individuals from contributing more than an aggregate of $25,000 in any calendar year, and political committees from contributing more than $5,000 to any political candidate. FECA Amendments of 1974 § 101, Pub. L. No. 93-443, 88 Stat. 1263, 1263. The Supreme Court ultimately upheld these contribution limits in the face of a First Amendment challenge, though it struck down FECA's expenditure limits. *Buckley v. Vales*, 424 U.S. 1, 58 (1976) (per curiam) (summarizing holdings). A few months after the *Buckley* Court handed down its decision, Congress amended FECA to distinguish (1) between contributions by persons and contributions by multicandidate political committees, and (2) among contributions to candidates and their authorized committees, contributions to national political party committees, and contributions to all other political committees. FECA Amendments of 1976 §§ 111, 201, Pub. L. No. 94-283, 90 Stat. 475, 486-87. Congress left the $25,000 aggregate limit on individuals' contributions untouched, however, until the Bipartisan Campaign Reform Act of 2002 (BCRA), which replaced the $25,000 aggregate limit with the bifurcated limiting scheme that Plaintiffs now challenge. Section 307, Pub. L. No. 107-155, 116 Stat. 81, 102-03. There are thus two sets of contribution limits: base limits calibrated to the identity of the contributor regulating how much the contributor may give to specified categories of recipients, and a set of aggregate limits regulating the total amount an individual may contribute in any two-year election cycle. Some (but not all) of these limits are

periodically indexed for inflation. *See* 2 U.S.C. § 441a(c).

The default base limits apply to contributions by "persons," that is, individuals, partnerships, committees, associations, corporations, unions, and other organizations. *See* 2 U.S.C. 431(11) (defining "person"). FECA currently prohibits persons from contributing more than $2,500 per election to any given candidate or that candidate's agent or authorized committee; more than $30,800 in any calendar year to each of a national political party's national committee, House campaign committee, and Senate campaign committee; more than $10,000 in any calendar year to a state party political committee; and more than $5,000 in any calendar year to any other political committee. 2 U.S.C. § 441a(a)(1); 11 C.F.R. § 110.1(b)-(d); 76 Fed. Reg. 8,368, 8,370 (Feb. 14, 2011) (indexing for inflation).

These base contribution limits do not limit how much a contributor can contribute as long as the contributions remain within the limits for each recipient. Under the base contribution limits, for example, an individual might contribute $3.5 million to one party and its affiliated committees in a single election cycle.[1]

---

[1] As amici Campaign Legal Center and Democracy 21 explain, because primary and general elections held during the same calendar year count as separate elections, 11 C.F.R. §§ 100.2, 110.1(j), an individual might contribute $5,000 to each of a party's House and Senate candidates, $30,800 to each of a party's three federal party committees each year, and $10,000 to each of a party's fifty state committees a year. McCutcheon does not dispute this calculation. This $3.5 million, moreover, does not include contributions to PACs, a sum that would equal $5,000 multiplied by whatever number of PACs an individual desires to give to.

The aggregate limits prevent this. During each two-year period starting in an odd-numbered year, no individual may contribute more than an aggregate of $46,200 to candidates and their authorized committees or more than $70,800 to anyone else. 2 U.S.C. § 441a (a)(3); 76 Fed. Reg. at 8,370. Of that $70,800, no more than $46,200 may be contributions to political committees that are not national political party committees. 2 U.S.C. § 441a(a)(3); 76 Fed. Reg. at 8,370. These aggregate limits, which amount to a total biennial limit of $117,000, 11 C.F.R. § 110.5(b); 76 Fed. Reg. at 8,370, thus prevent individuals from contributing the statutory maximum to more than eighteen candidates.

FECA includes a number of provisions designed to prevent evasion of the various limits. First, anyone who contributes more than permitted may be subject to civil or criminal penalties. 2 U.S.C. § 437g(a), (d). Second, indirect contributions, such as earmarked contributions to an intermediary, are deemed contributions to that candidate. 2 U.S.C. § 441 a(a)(8). Third, FECA prohibits contributions made in the name of someone else. 2 U.S.C. § 441f. Finally, contributions made or received by more than one "affiliated" committee are deemed to have been made or received by the same committee. 2 U.S.C. § 441a(a)(5); 11 C.F.R. §§ 100.5(g), 110.3.

B. Factual and Procedural Background

McCutcheon is an Alabama resident eligible to vote in a U.S. presidential election. Thus far, during the 2011-2012 election cycle, he has contributed a total of $33,088 to sixteen different candidates in amounts ranging from $1,776 to $2,500 per election; $1,776 to each of the RNC, the National Republican Senatorial Committee ("NRSC"), and the National Republican

Congressional Committee ("NRCC"); $2,000 to a non-party political committee (the Senate Conservatives Fund); and $20,000 to the federal account of a state party committee (the Alabama Republican Party). McCutcheon, however, wants to contribute more. He wants to contribute $1,776 to twelve other candidates and enough money to the RNC, NRSC, and NRCC to bring his total contributions up to $25,000 each. Doing either of these, however, would violate the aggregate limits: the additional candidate contributions would amount to aggregate candidate contributions of $54,400, and the additional party committee contributions would amount to aggregate contributions of $75,000 to national party committees. McCutcheon assures us he intends to repeat these donation patterns during future election cycles.

The RNC, meanwhile, wishes to receive contributions from individuals like McCutcheon that would be permissible under the base limits but violate the aggregate limit on contributions to party committees. Because of the aggregate limit, the RNC has both refused and returned contributions. The RNC believes that others would contribute to the RNC but for the limit. According to the verified complaint, the RNC does not control either the NRSC or the NRCC.

Plaintiffs challenge both the $46,200 aggregate limit on candidate contributions and the $70,800 aggregate limit on other contributions under the First Amendment. They challenge the $46,200 aggregate limit for being "unsupported by any cognizable government interest . . . at any level of review" and for being unconstitutionally low. They challenge the $70,800 aggregate limit facially, as applied to contributions up to $30,800 per calendar year to national party committees, and for being too low, both facially and as applied

to contributions to national party committees. Plaintiffs also ask this Court for a preliminary injunction to enjoin Federal Election Commission ("FEC") enforcement of the aggregate limits. We consolidated the preliminary injunction hearing with the hearing on the merits and now resolve both issues.

II. Discussion

A. Level of Scrutiny

Both contribution limits and expenditure limits implicate "the most fundamental" First Amendment interests, but each does so in a different way. *Buckley*, 424 U.S. at 14. The Supreme Court has accordingly applied different levels of scrutiny to each: expenditure limits are subject to strict scrutiny, while contribution limits will be valid as long as they satisfy "the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136 (2003) (quoting *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 162 (2003)), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). The Court has never repudiated this distinction. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011) (distinguishing between scrutiny of contributions and expenditures).

Plaintiffs argue that the aggregate limits must be subject to strict scrutiny because laws burdening political speech are subject to strict scrutiny and the aggregate limits "similarly 'burden' First Amendment rights." This syllogism is rooted in *Buckley* itself. The *Buckley* Court did not unequivocally hold that political expenditures are speech. Rather, it drew on the fact that "virtually every means of communicating ideas in today's mass society requires the expenditure of

money" to hold that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. Thus, the Court suggested, contribution limits might sometimes implicate rights of expression in more than a "marginal" way, like a spiking seismograph at the onset of an earthquake. More recently, *Citizens United* proclaimed that "[l]aws that burden political speech are 'subject to strict scrutiny,' 130 S. Ct. at 898, and this Court relied on that principle to preliminarily enjoin the FEC from enforcing limits on contributions to a political committee interested in making independent expenditures, *Carey v. Fed. Election Comm'n,* 791 F. Supp. 2d 121, 125, 128 (D.D.C.2011).[2] Although we acknowledge the constitutional line between political speech and political contributions grows increasingly difficult to discern, we decline Plaintiffs' invitation to anticipate the Supreme Court's agenda. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.,* 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Every contribution limit may "logi-

---

[2] We note contributions for independent expenditures are a different beast altogether. The *Carey* court was constrained by the D.C. Circuit's recent decision in *SpeechNow.org v. Fed. Election Comm'n,* 599 F.3d 686 (D.C. Cir. 2010), holding unconstitutional contribution limits to independent expenditure groups. *Id.* at 695.

cally reduce[] the total amount that the recipient of the contributions otherwise could spend," but for now, "this truism does not mean limits on contributions are simultaneously considered limits on expenditures that therefore receive strict scrutiny." *Republican Nat'l Comm. v. Fed. Election Comm'n*, 698 F. Supp. 2d 150, 156 (D.D.C.2010), *aff'd*, 130 S. Ct. 3544 (2010) (mem.); *see Citizens United*, 130 S. Ct. at 909 (declining to "reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny").

Plaintiffs try to escape the consequences of lesser scrutiny by arguing that the aggregate limits are actually expenditure limits, not contribution limits. Because § 441a(a)(1) already establishes base contribution limits, they say, "added biennial contribution limits are more appropriately deemed *expenditure* limits, subject to strict scrutiny." They are wrong. The difference between contributions and expenditures is the difference between giving money to an entity and spending that money directly on advocacy. Contribution limits are subject to lower scrutiny because they primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interests in other ways, *Buckley*, 424 U.S. at 22, 28; the limits primarily implicate associational rights rather than rights of expression because they impose only a "marginal" restriction on the contributor's "ability to engage in free communication," *id.* at 20; they impose only a marginal restriction on a contributor's expressive ability because the expressive value of a contribution derives from the "undifferentiated, symbolic act of communicating," *id.* at 21; and the expressive value of contributions is limited because "the transformation of contributions into political debate involves speech by someone other than

the contributor," *id.* The aggregate limits do not regulate money injected directly into the nation's political discourse; the regulated money goes into a pool from which another entity draws to fund its advocacy. *See Cal. Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182, 195-96 (1981) (rejecting "speech by proxy" argument that limit on contributions to political committee is actually expenditure limit "because it restricts the ability of [the contributor] to engage in political speech through a political committee"). To break the chain of legal consequences tied to that fact would require a judicial act we are not empowered to perform.

B. The Merits

The government may justify the aggregate limits as a means of preventing corruption or the appearance of corruption, or as a means of preventing circumvention of contribution limits imposed to further its anti-corruption interest.[3] *Buckley*, 424 U.S. at 26-27, 38. The Supreme Court has recognized no other governmental interest "sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech." *SpeechNow.org*, 599 F.3d at 692. "Corruption," though, is a narrow term of art: "Elected officials are influenced to act contrary to their obliga-

---

[3] Even after *Citizens United*, a number of other circuits continue to recognize anticorruption and anticircumvention as valid government interests. They likewise continue to recognize the government's interest in preventing the appearance of corruption. *See, e.g., United States v. Danielczyk*, 683 F.3d 611, 618 (4th Cir.2012); *Ognibene v. Parkes*, 671 F.3d 174, 187, 195 & n. 21 (2d Cir.2011); *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 153 (7th Cir.2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118, 1124-25 (9th Cir.2011).

tions of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political favors." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). Influence over or access to elected officials does not amount to corruption. *Citizens United,* 130 S. Ct. at 910 ("Democracy is premised on responsiveness." (quoting *McConnell,* 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part))).

Citizens United left unclear the constitutionally permissible scope of the government's anticorruption interest. It both restricted the concept of *quid-pro-quo* corruption to bribery, *see* 130 S. Ct. at 908 ("The practices *Buckley* noted would be covered by bribery laws if a quid pro quo arrangement were proved ."), and suggested that there is a wheeling-and-dealing space between pure bribery and mere influence and access where elected officials are "corrupt" for acting contrary to their representative obligations, *see id.* at 911 (stating that there would be "cause for concern" if elected officials "succumb to improper influences," "surrender their best judgment," and "put expediency before principle" because of independent expenditures). Yet if anything is clear, it is that contributing a large amount of money does not ipso facto implicate the government's anticorruption interest. The government's assertion that large contributions "could easily exert a corrupting influence on the democratic system" and would present "the appearance of corruption that is 'inherent in a regime of large individual financial contributions'" simply sweeps too broadly. McCutcheon alleges that he has "deeply held principles regarding government and public policy," believing that "the United States is

slowly but surely losing its character as an exceptional nation that stands for liberty and limited government under the Constitution." He wants to contribute to a number of candidates "who are interested in advancing the cause of liberty." Supporting general principles of governance does not bespeak corruption; such is democracy. "It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies." *Citizens United*, 130 S. Ct. at 910 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part)).

Plaintiffs do not, however, challenge the base contribution limits,[4] so we may assume they are valid expressions of the government's anticorruption interest. And that being so, we cannot ignore the ability of aggregate limits to prevent evasion of the base limits. *See Buckley*, 424 U.S. at 38 (upholding the $25,000 aggregate limit as "no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid"). Circumvention, after all, can be "very hard to trace." *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 462 (2001) ["*Colorado II*"]; *see McConnell*, 540 U.S. at 165, 224 (explaining that "[m]oney, like water, will always find an outlet," and Congress has learned "the hard lesson of circumvention" from "the entire history

---

[4] We take no position on whether plaintiffs could have done so. *See McConnell*, 540 U.S. at 229 ("This Court has no power to adjudicate a challenge to the FECA [contribution] limits because challenges to the constitutionality of FECA provisions are subject to direct review before an appropriate en banc court of appeals . . . not in the three-judge District Court convened pursuant to BCRA § 403(a).")).

of campaign finance regulation"). Eliminating the aggregate limits means an individual might, for example, give half-a-million dollars in a single check to a joint fundraising committee comprising a party's presidential candidate, the party's national party committee, and most of the party's state party committees. After the fundraiser, the committees are required to divvy the contributions to ensure that no committee receives more than its permitted share, 11 C.F.R. §§ 102.6(a)(1), 110.3(c)(2), but because party committees may transfer unlimited amounts of money to other party committees of the same party, the half-a-million-dollar contribution might nevertheless find its way to a single committee's coffers. 2 U.S.C. § 441a(a)(4); 11 C.F.R. §§ 102.6(a)(1)(ii), 110.3(c)(1). That committee, in turn, might use the money for coordinated expenditures, which have no "significant functional difference" from the party's direct candidate contributions. *Colorado II,* 533 U.S. at 460. The candidate who knows the coordinated expenditure funding derives from that single large check at the joint fundraising event will know precisely where to lay the wreath of gratitude.

Gratitude, of course, is not itself a constitutionally-cognizable form of corruption, *Republican Nat'l Comm.,* 698 F. Supp. 2d at 158, and it may seem unlikely that so many separate entities would willingly serve as conduits for a single contributor's interests. But it is not hard to imagine a situation where the parties implicitly agree to such a system, *see Colorado II,* 533 U.S. at 459 (upholding limits on coordinate spending as a means of preventing circumvention of contribution limits because of "informal bookkeeping" practices by which, among other things, "[d]onors would be told the money they contributed could be credited to any Senate candidate"), and there is no reason to think the quid

pro quo of an exchange depends on the number of steps in the transaction, *see McConnell*, 540 U.S. at 155 ("[T]here is no meaningful separation between the national party committees and the public officials who control them."). The Supreme Court has rejected the argument that Congress cannot restrict coordinated spending as an anticircumvention measure because there are "better crafted safeguards" in place like the earmarking rules. *Colorado II*, 533 U.S. at 462. We follow the Court's lead and conceive of the contribution limits as a coherent system rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis.

Given our conclusion that the aggregate limits are justified, we reject Plaintiffs' arguments that the limits are unconstitutionally low and unconstitutionally overbroad. It is not the judicial role to parse legislative judgment about what limits to impose. *See Randall v. Sorrell*, 548 U.S. 230, 248 (2006) (plurality) ("We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments. . . ."); *Colorado II*, 533 U.S. at 446 ("[T]he dollar amount of the limit need not be 'fine tun[ed].'" (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000))); *Buckley*, 424 at 30 ("[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." (internal quotation marks omitted)). Only if there are "danger signs" that the limits are not closely drawn will we examine the record to review the statute's tailoring. *Randall*, 548 U.S. at 249; *see Buckley*, 424 U.S. at 30 ("Such distinctions in degree become significant only when they can be said to amount to

differences in kind."). We see no danger signs here. Plaintiffs' argument depends on using "simple arithmetic" to translate the Vermont contribution limits invalidated in *Randall* to imaginary biennial limits on contributions to party committees and candidates. They argue that the limit on contributions to state party committees invalidated by *Randall* is equivalent to a biennial contribution limit of $198,389 to national party committees, which they explain is about $14,000 *more* than the total amount an individual could biennially contribute to the three committees—an amount an individual still cannot contribute because of the aggregate limits. They likewise argue that if an individual wanted to contribute equally to "one candidate of his choice in all 468 federal races" in 2006, he would be limited to contributing $85.29 per candidate for the entire election cycle, an amount "far below the $200 limit held too low in *Randall*." Even granting that Plaintiffs' methodology and results are correct,[5] "the dictates of

---

[5] Their premise that the *Randall* Court struck down a "$400 limit on contributions an individual may may make, over a two-year period, to a state party committee" distorts the Court's description that the statute in question "imposes a limit of $2,000 upon the amount any individual can give to a political party during a 2-year general election cycle." 548 U.S. at 239. In any event, to compare the amount of money required to reach the national population to the amount needed to reach just the citizens of Vermont is not a matter of a mere multiplier. If direct mail were the only means, such a multiplier might work. But to take a simple example, building a website to reach a national audience is not any more expensive than building one to reach citizens of a single state. As a result, Plaintiffs are wrong to create a simple ratio of money needed to reach Vermonters over money needed to reach all Americans.

the First Amendment are not mere functions of the Consumer Price Index." *Shrink Mo. Gov't PAC,* 528 U.S. at 397. The effect of the aggregate limits on a challenger's ability to wage an effective campaign is limited because the aggregate limits do not apply to nonindividuals. *See Randall,* 548 U.S. at 236, 249 (invalidating contribution limit that imposed a burden on First Amendment rights "disproportionately severe" to the government's legitimate interests because the limits "harm[ed] the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability"); *Buckley,* 424 U.S. at 21 (suggesting the contribution limits would be problematic if they "prevented candidates and political committees from amassing the resources necessary for effective advocacy"). And in any event, individuals remain able to volunteer, join political associations, and engage in independent expenditures. *See Wagner v. Fed. Election Comm'n,* Civ. Action No. 11-1841(JEB), 2012 WL 1255145, at *9 (D.D.C. Apr.16, 2012) ("There is even less need for the Court to interfere with legislative judgments where the persons affected by the ban have other meaningful avenues for political association and expression.").

Plaintiffs' overbreadth challenge consists of the conclusory assertions that the aggregate limits substantially inhibit protected speech and association "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications," and that "there is no 'scope of . . . plainly legitimate applications' "since neither political party proliferation nor movement of "massive" amounts of money through party committees or PACs to candidates is now possible. The *Buckley* Court rejected challenges that the contribution

limits are overbroad because most contributors are not seeking a quo for their quid and the base contribution limit is "unrealistically low." 424 U.S. at 30. Aside from these two claims, which we join the *Buckley* Court in rejecting, Plaintiffs do not explain how the aggregate limits potentially regulate both protected *and* unprotected conduct. *See Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (tracing the overbreadth doctrine to "concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech"); *Hill v. Colorado*, 530 U.S. 703, 731-32 (2000) (emphasizing that the overbreadth doctrine permits litigants to challenge a statute because of a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"); *Broadrick v. Oklahoma*, 413 U.S. 601, 610-12 (1973) (explaining the overbreadth doctrine as a tool for circumventing an otherwise prohibitory standing doctrine). Plaintiffs' overbreadth argument is essentially a severability claim, but because we conclude that nothing needs to be severed, this argument fails.

Plaintiffs raise the troubling possibility that *Citizens United* undermined the entire contribution limits scheme, but whether that case will ultimately spur a new evaluation of *Buckley* is a question for the Supreme Court, not us.

III. Conclusion

For the foregoing reasons, the Court will issue a contemporaneous Order denying Plaintiffs' Motion for a Preliminary Injunction and granting the FEC's motion to dismiss.

/s/
JANICE ROGERS BROWN
United States Circuit Judge

/s/
ROBERT L. WILKINS
United States District Judge

/s/
JAMES E. BOASBERG
United States District Judge

Date: September 28, 2012

ORDER AND FINAL JUDGMENT

For the reasons set forth in the Memorandum Opinion, it is this 28th day of September, 2012, hereby

ORDERED that the Defendant Federal Election Commission's motion to dismiss is **GRANTED**; it is further

ORDERED that the Plaintiff's motion for a preliminary injunction is **DISMISSED AS MOOT**; and it is further

ORDERED that final judgment be entered for the defendant.

SO ORDERED.

/s/
JANICE ROGERS BROWN
United States Circuit Judge

/s/
ROBERT L. WILKINS
United States District Judge

/s/
JAMES E. BOASBERG
United States District Judge

[Doc. 27, filed Oct. 10, 2012]

United States District Court
District of Columbia

Shaun McCutcheon et al., *Plaintiffs* v. **Federal Election Commission,** *Defendant*	**Civil No. 1:12-cv-01034-JEB-JRB-RLW** THREE-JUDGE COURT

Notice of Appeal to U.S. Supreme Court

Notice is given that Plaintiffs Shaun McCutcheon and the Republican National Committee hereby appeal to the United States Supreme Court from this Court's Order and Final Judgment (filed Sept. 28, 2012; Doc. 26) granting Defendant Federal Election Commission's motion to dismiss all claims and entering final judgment for FEC. Direct appeal is taken pursuant to § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002. Pub. L. No. 107-155, 116 Stat. 81, 113-14.

Respectfully submitted,

Of Counsel for Shaun McCutcheon:

Stephen M. Hoersting*

/s/ Dan Backer
Dan Backer, DC Bar #996641
DB CAPITOL STRATEGIES, PLLC
209 Pennsylvania Ave., S.E., Suite 2109
Washington, DC 20003
202/210-5431 phone
202/478-0750 fax
shoersting@dbcapitolstrategies.com
dbacker@dbcapitolstrategies.com

Jerad Wayne Najvar*
NAJVAR LAW FIRM
One Greenway Plaza, Suite 225
Houston, TX 77046
281/404-4696
jerad@najvarlaw.com

/s/ James Bopp, Jr.
James Bopp, Jr., DC Bar #CO 0041
jboppjr@aol.com, *Lead Counsel*

/s/ Richard E. Coleson
Richard E. Coleson*
rcoleson@bopplaw.com

Jeffrey P. Gallant*
jgallant@bopplaw.com
THE BOPP LAW FIRM, PC
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/235-3685 facsimile
Counsel for Plaintiffs

*Pro Hac Vice Application Granted

$5.00 Fee Paid

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

---

2 U.S.C. § 441a(a)(3) (2011-12, inflation-adjusted limits in brackets)

> (3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—
>
> (A) $37,500 [$46,200], in the case of contributions to candidates and the authorized committees of candidates;
>
> (B) $57,500 [$70,800], in the case of any other contributions, of which not more than $37,500 [$46,200] may be attributable to contributions to political committees which are not political committees of national political parties.

Bipartisan Campaign Reform Act of 2002 ("BCRA") § 403(a), 116 Stat. at 113-14

(a) Special Rules for Actions Brought on Constitutional Grounds. – If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by filing a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

MOTION

JAN 2 -

No. 12-536

In the Supreme Court of the United States

SHAUN MCCUTCHEON, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

ANTHONY HERMAN
General Counsel
LISA J. STEVENSON
Deputy General Counsel
DAVID KOLKER
Associate General Counsel
ADAV NOTI
Acting Assistant General Counsel
Federal Election Commission
Washington, D.C. 20463

QUESTION PRESENTED

Whether the three-judge district court correctly rejected appellants' constitutional challenge to federal statutory limits on the aggregate amounts that an individual may contribute to federal candidates, political parties, and other political committees, 2 U.S.C. 441a(a)(3).

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 7
Conclusion 26

TABLE OF AUTHORITIES

Cases:

Arizona Free Enter. Club's Freedom Club PAC v. *Bennett*, 131 S. Ct. 2806 (2011) 5, 10
Buckley v. *Valeo*:
424 U.S. 1 (1976) ..... *passim*
519 F.2d 821 (D.C. Cir. 1975) 3
California Med. Ass'n v. *FEC*, 453 U.S. 182 (1981) 5, 14
Davis v. *FEC*, 554 U.S. 724 (2008) 21
FEC v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) 6, 7, 17, 18, 19
FEC v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) 15, 16
McConnell v. *FEC*, 540 U.S. 93 (2003), overruled in part by *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010) ..... *passim*
Nixon v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) 7, 10, 16, 22, 23
Randall v. *Sorrell*, 548 U.S. 230 (2006) 7, 21, 23, 24

Statutes and regulation:

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 113-114 4
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* 1

Statutes and regulation—Continued: Page

2 U.S.C. 431(8)(A)(i) 2
2 U.S.C. 431(8)(B) 24
2 U.S.C. 441(a)(1)(A)-(D) 2
2 U.S.C. 441(a)(1)(B)-(D) 11
2 U.S.C. 441a(a) 2
2 U.S.C. 441a(a)(3) 2
2 U.S.C. 441a(a)(3)(A) 3
2 U.S.C. 441a(a)(3)(B) 3
2 U.S.C. 441a(a)(4) 14
2 U.S.C. 441a(a)(8) 17
2 U.S.C. 441a(c) 24
11 C.F.R. 100.2 2

Miscellaneous:

EMILY's List, *Our Races*, http://www.emilyslist.org/what/races (last visited Dec. 28, 2012) 12
120 Cong. Rec. 27,224 (1974) 2
FEC:
Detailed Files About Candidates, Parties and Other Committees, http://www.fec.gov/finance/disclosure/ftpdet.shtml (last visited Dec. 28, 2012) 20
Disclosure Data Catalog, http://www.fec.gov/data/DataCatalog.do?cf=downloadable (last visited Dec. 28, 2012) 20
PAC Count—1974 to Present, http://www.fec.gov/press/summaries/2011/2011paccount.shtml (last visited Dec. 28, 2012) 12
2011-2012 Election Cycle: Total Disbursements by Entity Type, http://www.fec.gov/law/2012TDbyEntity.shtml (last visited Dec. 28, 2012) 24

Miscellaneous—Continued: Page

Press Release, *NARAL Pro-Choice America, NARAL Pro-Choice America PAC Announces New Endorsements in Key House, Senate Contests To End War on Women* (Apr. 3, 2012), http://www.prochoiceamerica.org/elections/elections-press-releases/2012/pr04032012_pac-endorsements.html 12

Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold, 76 Fed. Reg. (Feb. 14, 2011):

pp. 8369-8370 2

p. 8370 3

In the Supreme Court of the United States

No. 12-536

SHAUN MCCUTCHEON, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The opinion of the three-judge district court granting the government's motion to dismiss (J.S. App. 1a-17a) is not yet published in the *Federal Supplement* but is available at 2012 WL 4466482.

JURISDICTION

The judgment of the three-judge district court was entered on September 28, 2012. A notice of appeal was filed on October 9, 2012, and the jurisdictional statement was filed on October 26, 2012. The jurisdiction of this Court is invoked under Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 113-114.

STATEMENT

1. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, places two types of limits on the amounts of money that an individual can contrib-

ute in connection with a federal election. First, FECA imposes base limits on the amounts that an individual can contribute to any one candidate, political party, or non-party political committee. 2 U.S.C. 441a(a); see 2 U.S.C. 431(8)(A)(i) (definition of "contribution"). As inflation-adjusted for the 2011-2012 election cycle, FECA permitted an individual to contribute up to $2500 per election (counting primary and general elections separately) to "any candidate and his authorized political committees"; up to $30,800 per year to "the political committees established and maintained by a national political party"; up to $10,000 per year "to a political committee established and maintained by a State committee of a political party"; and up to $5000 per year "to any other political committee." 2 U.S.C. 441a(a)(1)(A)-(D); see *Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold*, 76 Fed. Reg. 8368, 8369-8370 (Feb. 14, 2011); see also 11 C.F.R. 100.2 (definition of "election").

Second, FECA imposes aggregate limits on the total amounts that an individual can contribute to all federal candidates and political committees during a two-year election cycle. 2 U.S.C. 441a(a)(3). The aggregate limits serve to "curtail the influence of excessive political contributions by any single person." 120 Cong. Rec. 27,224 (1974) (statement of Rep. Brademas). The congressional findings accompanying the 1974 enactment of the FECA contribution limits identified instances in which contributions to numerous separate entities had been used to funnel campaign funds at the request of a particular candidate. For example, the dairy industry had avoided then-existing reporting requirements by dividing a $2,000,000 contribution to President Nixon among hundreds of committees in different States, "which could

then hold the money for the President's reelection campaign." *Buckley* v. *Valeo*, 519 F.2d 821, 839 n.36 (D.C. Cir. 1975) (per curiam). On another occasion, a presidential aide had promised an ambassadorship to a particular individual in return for "a $100,000 contribution to be split between 1970 senatorial candidates designated by the White House and [President] Nixon's 1972 campaign." *Id.* at 840 n.38.

As inflation-adjusted for the 2011-2012 election cycle, FECA's aggregate limits permitted an individual to make a total of $117,000 in contributions in each two-year election cycle. 2 U.S.C. 441a(a)(3)(B); 76 Fed. Reg. at 8370. An individual could contribute $46,200 to candidates for federal office. 2 U.S.C. 441a(a)(3)(A); 76 Fed. Reg. at 8370. An individual could contribute another $70,800 to non-candidate entities—*i.e.*, national political parties, state political parties, and non-party political committees—so long as no more than $46,200 of that amount went to state political parties or non-party political committees. 2 U.S.C. 441a(a)(3)(B); 76 Fed. Reg. at 8370.

2. Appellants are Shaun McCutcheon and the Republican National Committee (RNC), a national committee of the Republican Party. J.S. App. 2a, 4a-5a. McCutcheon alleges that he would like to make, and the RNC alleges that it would like to receive, contributions that are within FECA's base limits on contributions to particular entities but that would (in combination with other contributions made by McCutcheon) exceed FECA's aggregate limits. *Id.* at 4a-5a.

In particular, McCutcheon alleges that during the 2011-2012 election cycle, he contributed a total of $33,088 to 16 different federal candidates, but wished to contribute $1776 apiece to 12 more candidates. J.S.

App. 4a. Those additional contributions would have brought his candidate-contribution total to $54,400, which would have exceeded FECA's aggregate limit by $8200. *Id.* at 4a-5a. McCutcheon also alleges that he wished to contribute $25,000 to each of three political committees established and maintained by the Republican Party (the RNC, the National Republican Senatorial Committee, and the National Republican Congressional Committee). *Id.* at 5a. Those contributions would have brought his non-candidate contributions—which included a $20,000 contribution to the Alabama Republican Party and a $2000 contribution to the Senate Conservatives Fund (a non-party political committee)—to $97,000, which would have exceeded FECA's aggregate limit on contributions to non-candidate entities by $26,200. *Ibid.* McCutcheon additionally alleges a desire to make a similar pattern of contributions in future election cycles. *Ibid.*

3. Appellants filed suit in the United States District Court for the District of Columbia, raising First Amendment challenges to both the $46,200 aggregate limit on contributions to federal candidates and the $70,800 aggregate limit on contributions to non-candidate entities. J.S. App. 1a, 4a-5a. A three-judge district court—convened pursuant to Section 403 of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 113-114—denied appellants' request for a preliminary injunction and granted the government's motion to dismiss. J.S. App. 1a-17a.

As an initial matter, the district court rejected appellants' argument that the aggregate contribution limits are subject to strict scrutiny. J.S. App. 5a-8a. The district court recognized that, although this Court has applied strict scrutiny to expenditure limits (*i.e.*, limits on

amounts spent directly on political speech), it has not done so for contribution limits (*i.e.*, limits on amounts given to support others' political activity). *Id.* at 6a (citing, *inter alia*, *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2817 (2011)). Rather, this Court has held that contribution limits are "valid as long as they satisfy 'the lesser demand of being closely drawn to match a sufficiently important interest.'" *Ibid.* (quoting *McConnell* v. *FEC*, 540 U.S. 93, 136 (2003), overruled in part by *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010)). The Court has found that less stringent standard to be appropriate because contribution limits "primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interests in other ways." *Id.* at 8a (citing *Buckley* v. *Valeo*, 424 U.S. 1, 22, 28 (1976) (per curiam)). The district court applied that less stringent standard here, explaining that FECA's aggregate limits "do not regulate money injected directly into the nation's political discourse; the regulated money goes into a pool from which another entity draws to fund its advocacy." *Id.* at 9a (citing *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 195-196 (1981) (plurality opinion)).

Applying that standard to the aggregate limits at issue here, the district court observed that this Court has identified two important governmental interests that justify contribution limits: (1) "preventing corruption or the appearance of corruption"; and (2) "preventing circumvention of contribution limits imposed to further [the government's] anti-corruption interest." J.S. App. 9a (citing *Buckley*, 424 U.S. at 26-27, 38). The district court explained that, because appellants had not challenged the base limits on contributions to individual en-

tities (*e.g.*, the $2500 per election limit on contributions to candidates), the court could "assume [those limits] are valid expressions of the government's anticorruption interest." *Id.* at 11a. "[T]hat being so," the court continued, "we cannot ignore the ability of aggregate limits to prevent evasion of the base limits." *Ibid.*

The district court explained that, in *Buckley* v. *Valeo*, *supra*, this Court had upheld the aggregate contribution limit in the then-current version of FECA as "no more than a corollary of the basic individual contribution limitation that [it found] to be constitutionally valid." J.S. App. 11a (quoting *Buckley*, 424 U.S. at 38); see *id.* at 15a-16a (finding appellants' overbreadth claim to be foreclosed by *Buckley*). The district court drew additional support from this Court's decision in *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), which upheld FECA's restrictions on party expenditures that are coordinated with a candidate. The district court noted, *inter alia*, that the decision in *Colorado II* had rested largely on a concern that contributions to one entity (a political party) could be used effectively to circumvent the base limits on contributions to another (an individual candidate). J.S. App. 12a (citing *Colorado II*, 533 U.S. at 459). The district court reasoned that the aggregate contribution limits here served to prevent similar circumvention, which might otherwise occur through artifices such as transfers of contributions between different party committees. *Ibid.* The district court stated that it would "follow [this] Court's lead and conceive of the contribution limits as a coherent system" that includes both base limits and aggregate limits, "rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis." *Id.* at 13a.

The district court also rejected appellants' arguments that FECA's aggregate contribution limits are too low. J.S. App. 13a-15a. The district court cited several decisions of this Court for the proposition that "[i]t is not the judicial role to parse legislative judgments about what limits to impose." *Id.* at 13a (citing *Randall* v. *Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion); *Colorado II*, 533 U.S. at 466; *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000); *Buckley*, 424 U.S. at 30). It further explained, *inter alia*, that "individuals remain able to volunteer, join political associations, and engage in independent expenditures." *Id.* at 15a.

ARGUMENT

The three-judge district court's unanimous decision reflects a straightforward application of this Court's precedents. This Court upheld FECA's aggregate contribution limit in *Buckley* v. *Valeo*, 424 U.S. 1, 38 (1976) (per curiam), and that holding applies with full force to the aggregate limits in the current version of the statute. The appeal should therefore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

1. In *Buckley*, this Court upheld the constitutionality of various contribution limitations in the 1974 version of FECA, including a base limit of $1000 on contributions by an individual to a candidate and an aggregate limit of $25,000 on total contributions by an individual in any calendar year. 424 U.S. at 23-38. In doing so, the Court recognized that limits on contributions, unlike limits on expenditures, are not subject to strict scrutiny under the First Amendment. Compare, *e.g.*, *id.* at 24-25, with *id.* at 52-54. Instead, the Court concluded that contribution limits are constitutional so long as the government "demonstrates a sufficiently important interest and em-

ploys means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25.

The Court explained that, "[b]y contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21. That is because "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21. While the contribution itself "serves as a general expression of support for the candidate and his views," it "does not communicate the underlying basis for the support," and the "quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Ibid.* Furthermore, although contribution limits "impinge on protected associational freedoms" by "limit[ing] one important means of associating with a candidate or committee," they do not preclude other means of association, and they "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.* at 22.

Applying the reduced degree of scrutiny appropriate to contribution limits, the Court in *Buckley* identified two "weighty interests * * * sufficient to justify" the then-current $1000 limit on individual contributions to candidates. 424 U.S. at 28-29. First, the limit reduced the opportunity for individuals to use large contributions "to secure a political *quid pro quo* from current and potential office holders." *Id.* at 26-27. Second, and "[o]f almost equal concern," the limit reduced "the ap-

pearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 27.

Turning to the $25,000 aggregate contribution limit, the Court found it to be "no more than a corollary of the basic individual contribution limitation" that the Court had already "found to be constitutionally valid." *Buckley*, 424 U.S. at 38. The Court accepted that the "overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." *Ibid.* It reasoned, however, that "this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Ibid.*

2. In this case, appellants do not challenge the constitutionality of FECA's base limits on contributions to particular candidates or political committees. J.S. App. 11a & n.4. They argue instead that, even if the base limits are constitutional, FECA's aggregate contribution limits violate the First Amendment. That argument is foreclosed by *Buckley*'s holding that the aggregate ceiling is a permissible legislative effort "to prevent evasion" of the individual limits. 424 U.S. at 38. Contrary to appellants' contentions, nothing in this Court's post-*Buckley* case law or in the current version of FECA justifies abandoning that holding.

a. Appellants first contend (J.S. 6-9) that strict scrutiny should apply to the current aggregate limits. That contention is unfounded. Since *Buckley*, this Court has

continued to adhere to the distinction between expenditure limits (which are subject to strict scrutiny) and contribution limits (which are not). See, *e.g.*, *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2817 (2011) ("[W]e have subjected strictures on campaign-related speech that we have found less onerous to a lower level of scrutiny and upheld those restrictions. For example, after finding that the restriction at issue was 'closely drawn' to serve a 'sufficiently important interest,' * * * we have upheld government-imposed limits on contributions to candidates.") (citing *McConnell* v. *FEC*, 540 U.S. 93, 136 (2003), overruled in part by *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000); and *Buckley*, 424 U.S. at 23-35).

Appellants assert that the biennial contribution limits in the current version of FECA "function in essence as expenditure limits" because they restrict "*how many* entities an individual may express support for, or associate with, by making base-level contributions, i.e., how much one may *spend* on political expression and association as base-level contributions." J.S. 8; see J.S. 6. The aggregate limit upheld in *Buckley*, however, imposed the very same type of restriction about which appellants now complain. The Court there took as a given that the "overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support," but it did not apply strict scrutiny, and it upheld the aggregate limit against constitutional challenge. 424 U.S. at 38. Appellants provide no persuasive reason for applying a different level of scrutiny now.

b. Appellants next contend (J.S. 9-14) that post-*Buckley* amendments to FECA have undermined the anti-circumvention rationale on which the *Buckley* Court relied in upholding the aggregate limit. Appellants observe (J.S. 12) that, under the version of the law in effect when *Buckley* was decided, the only base individual contribution limit in FECA was a $1000 limit on contributions to candidates. By contrast, the current version of FECA contains base limits on individual contributions to party and non-party political committees as well. See 2 U.S.C. 441(a)(1)(B)-(D). Appellants argue that these additional base limits adequately address any circumvention concerns that may exist, leaving no anti-circumvention work left for the aggregate contribution limits to do.

That argument is misconceived. Without a ceiling on aggregate contributions, contributors now could still do exactly what the *Buckley*-era aggregate limit permissibly prevented: "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38. To be sure, whereas the aggregate contribution limit was previously the only check on "huge contributions" to a single political committee or political party, FECA now contains specific limits that more directly address that concern. Contrary to appellants' contention, however, those more specific limits do not fully obviate the danger that limits on contributions to a particular candidate may be circumvented through contributions to other recipients.

A particularly effective circumvention technique, both when *Buckley* was decided and today, would be to

donate money to many different entities, each of which could then make its own contribution to the candidate. For two principal reasons, that technique is even easier now than it was when *Buckley* was decided. First, more than four times as many political committees exist today as in 1976. FEC, *PAC Count—1974 to Present*, http://www.fec.gov/press/summaries/2011/2011paccount.shtml (last visited Dec. 28, 2012) (listing 1146 political committees as of Dec. 31, 1976 and 5220 as of July 1, 2012). Second, it is much simpler today than in 1976 to determine which candidates are likely to benefit from a contribution to a particular committee, as many committees provide that information on their websites. See, *e.g.*, EMILY's List, *Our Races*, http://www.emilyslist.org/what/races (last visited Dec. 28, 2012); Press Release, *NARAL Pro-Choice America PAC Announces New Endorsements in Key House, Senate Contests To End War on Women* (Apr. 3, 2012), http://www.prochoiceamerica.org/elections/elections-press-releases/2012/pr04032012_pac-endorsements.html.

Appellants nonetheless argue (J.S. 18-19) that the aggregate limits are superfluous. In their view, Congress has "made the judgment" that, if a contribution to a single entity is below the base limit (*e.g.*, if a contribution to a political party is below $30,800), it presents no "cognizable" risk of corruption or circumvention. See *ibid.* Appellants further contend that, if no single contribution within the base limits poses a cognizable danger, Congress can have no legitimate interest in regulating the number of such contributions that an individual makes. See J.S. 19. Both steps of appellants' reasoning are flawed.

First, Congress's choice of applicable base limits on contributions to particular candidates or other entities

does not reflect any implicit determination that contributions below those limits pose no risk whatever of corruption or circumvention. Rather, the base limits strike a balance between enabling individuals to legitimately influence elections and reducing the opportunities for actual and apparent corruption. See, *e.g.*, *Buckley*, 424 U.S. at 26 (observing that "the Act's primary purpose [is] to *limit* the actuality and appearance of corruption") (emphasis added). Second, even if a single contribution below the base limit were per se risk-free, an unchecked proliferation of similar contributions would still pose meaningful dangers. As discussed above, multiple contributions create the risk that an individual contributor can circumvent the base limits by channeling his money in such a way that a particular target is likely to receive much more than the base limits would allow (*e.g.*, by contributing to political committees likely to contribute to a particular candidate). That is the precise risk that the Court in *Buckley* recognized as sufficient to uphold the aggregate contribution limit. *Id.* at 38.

Even apart from the risk that the base contribution limits may be circumvented by transfers of funds between the various recipients of contributions from a single donor, FECA's aggregate limits serve a legitimate anti-corruption purpose. If the aggregate limits did not exist, "an individual might contribute $3.5 million to one party and its affiliated committees in a single election cycle," yet remain in compliance with all of FECA's base contribution limits. J.S. App. 3a & n.1. Congress could reasonably conclude that an individual who made contributions of that magnitude to a party's overall electoral efforts might acquire actual or perceived "improper influence" (*Buckley*, 424 U.S. at 27) over the party's elect-

ed officials, even if no single contribution was likely to have that effect.

This Court's decision in *California Medical Association* v. *FEC*, 453 U.S. 182 (1981), confirms that aggregate limits and limits on contributions to political committees can permissibly coexist under the First Amendment. In that case, the Court upheld the constitutionality of a $5000 limit on contributions by an individual or an unincorporated association to a "multicandidate political committee" (*i.e.*, a political committee that receives contributions from more than 50 people and contributes to more than five candidates). *Id.* at 184-185 & n.1 (citing 2 U.S.C. 441a(a)(4)). A plurality of the Court reasoned that, if a donor could make unlimited contributions to multicandidate political committees, he could circumvent both the $1000 limit on individual contributions to candidates and the $25,000 limit on aggregate contributions to candidates, simply by giving large sums to the multicandidate committee and allowing the committee to make the contributions to the candidates. *Id.* at 198 (plurality opinion). Justice Blackmun's concurrence contained similar reasoning. *Id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment) (agreeing that the limit on contributions to multicandidate committees could be upheld on anti-circumvention grounds, and analogizing the limit to "the $25,000 limitation on total contributions in a given year that *Buckley* held to be constitutional"). A majority of the Court thus recognized that aggregate limits can operate in tandem with limits on contributions to political committees. Appellants' contention that the First

Amendment forces Congress to choose one or the other cannot be squared with that analysis.[1]

c. Appellants contend (J.S. 16-28) that FECA's aggregate contribution limits are too far attenuated from actual anti-corruption and anti-circumvention concerns to survive First Amendment scrutiny. That is essentially a repackaging of their argument that base contribution limits obviate the need for aggregate contribution limits. It fails for much the same reasons, as well as several others.

First, appellants' reliance (J.S. 17) on isolated language from the controlling opinion in *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*), is misplaced. In concluding that BCRA's restrictions on corporate "electioneering communications" were unconstitutional as applied to the political advertisements at issue in that case, see *id.* at 455-457, 460, 481, the controlling opinion stated that "a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny," *id.* at 479. That statement has no bearing on this case. Unlike the restrictions on independent advocacy that were at issue in *WRTL*, the contribution limits at issue here do not "regulat[e] expression" and are not subject to "strict scrutiny." *Ibid.* Indeed, the controlling opinion in *WRTL* relied on the established

---

[1] Appellants suggest (J.S. 24 n.9) that aggregate limits on individual contributions are "underinclusive" because multicandidate political committees do not have similar aggregate limits. That reasoning is faulty. Imposing similar aggregate limits on multicandidate committees would undercut the purpose of such committees, which is to provide a mechanism for multiple individuals to pool their money to support multiple candidates. Congress would have little reason to enable the creation of an entity to take in, say, $255,000 per year ($5000 from each of 51 persons) if that entity were then limited to contributing a total of $46,200 biennially.

distinction between contributions and independent expenditures, observing that "[t]o equate WRTL's ads with contributions is to ignore their value as political speech." *Ibid.*

Second, FECA's aggregate limits are not properly characterized as a "prophylaxis-upon-prophylaxis." The premise of that argument is that contribution limits are themselves simply a prophylactic measure against bribery-like *quid pro quo* arrangements with public officials. See J.S. 20. The Court in *Buckley* observed, however, that, because bribery laws reach "only the most blatant and specific attempts" to corrupt public officials with money, those laws do not fully vindicate the government's anti-corruption interests. 424 U.S. at 28; see *McConnell*, 540 U.S. at 143 (noting that the Court in *Buckley* "expressly rejected the argument that anti-bribery laws provided a less restrictive alternative to FECA's contribution limits"). In particular, the Court recognized that contribution limits promote an interest, "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements," in reducing "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27; see *Shrink Mo. Gov't PAC*, 528 U.S. at 390 ("The public interest in countering [the perception of corruption] was * * * the entire answer to the overbreadth claim raised in the *Buckley* case."); see also *McConnell*, 540 U.S. at 143-144.

Because this Court's decisions "have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits," *McConnell*, 540 U.S. at 143, such limits are not themselves prophylactic. See *id.* at 143-

144. This Court's precedents additionally recognize that the government's interests in combating corruption and its appearance "have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits." *Id.* at 144; see, *e.g.*, *Colorado II*, 533 U.S. 431, 456 (2001) ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption."). As the Court in *Buckley* put it, aggregate contribution limits are simply a "corollary" of base contribution limits. 424 U.S. at 38.[2]

Third, appellants are mistaken in contending (J.S. 20-23, 27-28) that the government's anti-corruption and anti-circumvention interests are adequately protected by FECA's "earmarking" provision, 2 U.S.C. 441a(a)(8). That provision counts contributions to one entity (*e.g.*, a political committee) earmarked for transfer to a second entity (*e.g.*, a candidate) as contributions to that second entity for purposes of a person's base contribution limits (*e.g.*, the $2500 limit on candidate contributions). *Ibid.* The Court in *Buckley* recognized, however, that aggregate limits serve the permissible interest of preventing

---

[2] Appellants assert (J.S. 15) that this Court's decision in *Citizens United* v. *FEC*, *supra*, called the constitutionality of contribution limits into question by restricting the scope of the government's anti-corruption interest to direct *quid pro quo* exchanges. Appellants' reliance on *Citizens United* is misplaced. That case involved limitations on independent expenditures, and the Court expressly declined to address the constitutionality of limitations on contributions. See, *e.g.*, 130 S. Ct. at 909 ("Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny."); *ibid.* (observing that "contribution limits * * * have been an accepted means to prevent *quid pro quo* corruption").

circumvention "through the use of *unearmarked* contributions." 424 U.S. at 38 (emphasis added). Appellants' argument is also foreclosed by this Court's decision in *Colorado II*, which rejected the contention that the earmarking provision constitutes "the outer limit of acceptable tailoring" in support of the government's anti-corruption and anti-circumvention interests. 533 U.S. at 462; see J.S. App. 13a. The Court in *Colorado II* explained that such a contention "ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions," which can include various informal ways for political-party contributors to indicate how they want their money spent, and which make circumvention "very hard to trace." 533 U.S. at 462; see also *id.* at 459 (describing "tally system," through which political parties helped channel funds from contributors to candidates while avoiding formal earmarking).

Fourth, appellants are wrong in asserting (J.S. 24, 26) that aggregate contribution limits constitute an impermissible attempt to "level the playing field" by equalizing the amount of speech on different sides of a political campaign. The Court in *Buckley* recognized that contribution limits, unlike expenditure limits, are not speech-equalization measures. 424 U.S. at 25-26 & n.26. "Contribution limitations alone," the Court explained, "would not reduce the greater potential voice of affluent persons and well-financed groups, who would remain free to spend unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters." *Id.* at 26 n.26.

d. Appellants appear to contend (J.S. 15-17, 32-37) that the structure of FECA's current aggregate limits (which are broken into separate categories for contribu-

tions to candidates and contributions to non-candidate entities) materially differs from the structure of the aggregate limit considered in *Buckley* (which was not broken out in that fashion). That difference provides no basis for avoiding the binding force of *Buckley*'s holding that an aggregate limit is constitutional. As the Court recognized in *Buckley*, the undifferentiated $25,000 limit had the purpose and effect of limiting both total contributions to parties and total contributions to candidates. 424 U.S. at 38. The minor structural change of specifying two separate aggregate limits, rather than a single aggregate limit, cannot render the current statutory scheme unconstitutional.

In any event, appellants' objections to the two distinct aggregate limits fail on their own terms. Notwithstanding appellants' reliance (J.S. 15-16) on a plurality opinion at an earlier stage of the same case, this Court's decision in *Colorado II* squarely rejected the proposition that contributions to political parties have no potential for corruption or circumvention. The Court recognized that, "whether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452. The record in *Colorado II* showed that "substantial donations turn the parties into matchmakers whose special meetings and receptions give the donors the chance to get their points across to the candidates." *Id.* at 461. Moreover, as the Court observed in a later case, "there is no meaningful separation between the national party committees and the public officials who control them" because the "national committees of the two major parties are both run by, and largely composed of, federal officeholders and candidates." *McConnell*, 540 U.S. at 155 (internal quotation marks and brackets omitted).

As for the aggregate limits on contributions to candidates, appellants are also wrong in suggesting (J.S. 33-35) that candidates cannot serve as conduits for circumventing the individual contribution limits. Just as a contributor can give $5000 each to a number of political committees that in turn give to one candidate, the contributor can give $5000 each to a number of candidates who in turn give to one candidate (or to the party, which can make coordinated or independent expenditures in support of that candidate). Cf. *Colorado II*, 533 U.S. at 459-460 (describing political party's system of "informal bookkeeping * * * to connect donors to candidates through the accommodation of a party"). Appellants do not appear to dispute that such transfers take place, and FEC data show that candidates in "safe" districts regularly contribute campaign funds to candidates in their party who face more difficult elections. See generally FEC, *Detailed Files About Candidates, Parties, and Other Committees*, http://www.fec.gov/finance/disclosure/ftpdet.shtml (last visited Dec. 28, 2012); FEC, *Disclosure Data Catalog*, http://www.fec.gov/data/DataCatalog.do?cf=downloadable (last visited Dec. 28, 2012). And, contrary to appellants' speculation (J.S. 35) that the candidates themselves are likely to take sole credit for such contributions, evidence has shown that, even in contexts where contributions are not made directly to federal candidates, "federal officeholders [have been] well aware of the identities of the donors." *McConnell*, 540 U.S. at 147.

e. Finally, it is irrelevant that the Court in *Buckley* addressed only a facial constitutional challenge to FECA's aggregate contribution limit, while appellants describe their own suit as raising as-applied and overbreadth challenges. See, *e.g.*, J.S. 10, 27-28. A plaintiff's

characterization of his own challenge is not controlling, *Citizens United*, 130 S. Ct. at 893, and appellants do not meaningfully differentiate their claims from those rejected in *Buckley*. See, *e.g.*, J.S. 28-29 (arguing that aggregate limits on candidate contributions are substantially overbroad for the same reason that they are alleged to be facially unconstitutional). In particular, appellants identify no unusual feature of their own circumstances that would render the aggregate limits invalid as applied to them if the limits are generally constitutional.

3. As an alternative to their primary argument, which challenges the existence of any aggregate contribution limits at all, appellants contend (J.S. 29-32, 34-37) that FECA's current aggregate limits violate the First Amendment because the amount of contributions they allow is too low. That contention fails under well-settled law and presents no substantial question for this Court to review.

a. As the district court recognized (J.S. App. 13a), this Court has generally declined to second-guess legislative judgments about the exact dollar figure of contribution limits. The Court has "ordinarily * * * deferred to the legislature's determination of such matters," recognizing that a "legislature is better equipped to make such empirical judgments" based on legislators' "particular expertise in matters related to the costs and nature of running for office." *Randall* v. *Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion) (internal quotation marks and citation omitted); see *Davis* v. *FEC*, 554 U.S. 724, 737 (2008) ("When contribution limits are challenged as too restrictive, we have extended a measure of deference to the judgment of the legislative body that enacted the law."); *Buckley*, 424 U.S. at 30 ("[A] court

has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.").

Consistent with this deferential standard of review, the level of a contribution limit violates the First Amendment only if it is "so low as to 'prevent candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21) (brackets omitted); see *Buckley*, 424 U.S. at 30 ("[D]istinctions in degree become significant only when they can be said to amount to differences in kind."). The Court "ask[s], in other words, whether the contribution limitation [is] so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink Mo. Gov't PAC*, 528 U.S. at 397. "Such being the test, the issue * * * cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming." *Ibid.*

b. Appellants offer two arguments to support their contention that FECA's current aggregate limits are unconstitutionally low. First, appellants assert (J.S. 34) that, when inflation is taken into account, the current aggregate limits are in certain respects more restrictive than the $25,000 aggregate limit upheld in *Buckley*. Appellants acknowledge, however, that $25,000 in 1974 is equivalent to $116,676 today, which is slightly less than the current $117,000 combined aggregate limit on contributions to candidates and committees. See *ibid.* In any event, this Court has previously rejected an inflation-based argument materially indistinguishable from appellants' current challenge. See *Shrink Mo. Gov't PAC*, 528 U.S. at 396-397. The Court explained in that

case that reading *Buckley* to "set a minimum constitutional threshold for contribution limits" reflects "a fundamental misunderstanding of what [*Buckley*] held." *Id.* at 396. "[T]he dictates of the First Amendment," the Court explained, "are not mere functions of the Consumer Price Index." *Id.* at 397.

Second, appellants seek to compare (J.S. 29-31, 36-37) the aggregate contribution limits at issue here to the state contribution limits that were struck down in *Randall* v. *Sorrell*, *supra*, the only case in which this Court has found a contribution limit to be unconstitutionally low. See 548 U.S. at 236-237. The state limits at issue in *Randall* restricted individual contributions to a candidate to between $200 and $400 (depending on the office) in a two-year period; they were not indexed to inflation; they applied to contributions made by political committees (including political parties) as well as those made by individuals; and they counted the value of certain self-paid expenses by campaign volunteers (such as travel expenses) as contributions. See *id.* at 237-239, 259 (plurality opinion). The plurality found the limits unconstitutional "based not merely on the low dollar amounts of the limits themselves, but also on the statute's effect on political parties and on volunteer activity in Vermont elections." *Id.* at 253. "*Taken together*," the Court concluded, "[the state law's] substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election, on the ability of political parties to help their candidates get elected, and on the ability of individual citizens to volunteer their time to campaigns show that the Act is not closely drawn to meet its objectives." *Ibid.*

The FECA limits at issue here differ in key respects from the limits at issue in *Randall*. The FECA limits

permit substantially higher contributions, see pp. 1-3, *supra*; they generally are indexed for inflation, see 2 U.S.C. 441a(c); they allow political parties to contribute amounts significantly greater than the individual contribution limit, see *Randall*, 548 U.S. at 258 (plurality opinion); and they do not count many volunteer activities as contributions, see 2 U.S.C. 431(8)(B). Appellants do not and could not plausibly allege that FECA's aggregate limits substantially restrict the ability of any federal candidate to "run a competitive election" or the ability of a national political party "to help [its] candidates get elected." *Randall*, 548 U.S. at 253 (plurality opinion); see, *e.g.*, FEC, *2011-2012 Election Cycle: Total Disbursements by Entity Type*, http://www.fec.gov/law/2012TDbyEntity.shtml (last visited Dec. 28, 2012) (reporting that federal candidates spent more than $3 billion, and parties more than $2 billion, in the 2011-2012 election cycle). Appellants' argument instead is simply that the aggregate amount an individual contributor can give, if amortized across all federal candidates of a particular party, results in a somewhat smaller per-candidate contribution than the individual limits found unconstitutional in *Randall*. J.S. 30-31. That argument substantially oversimplifies *Randall*, and it overlooks the fact that the constitutionality of a contribution limit is analyzed from the perspective of the recipient, not the contributor. See, *e.g.*, *McConnell*, 540 U.S. at 135 ("[W]e have said that contribution limits impose serious burdens on free speech only if they are so low as to 'prevent candidates and political committees from amassing the resources necessary for effective advocacy.'") (quoting *Buckley*, 424 U.S. at 21) (brackets omitted).

Appellants are also wrong in asserting that the aggregate limits in FECA impermissibly constrict a con-

tributor's First Amendment rights. Appellant McCutcheon or any other contributor can engage in the "symbolic act of contributing," *Buckley*, 424 U.S. at 21, to every candidate in every federal election. Individuals are limited only in the *amounts* they can give to those candidates: the more candidates to whom they contribute, the smaller their average contributions must be. But that is not a substantial First Amendment burden, for "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution." *Ibid.*

As previously noted, the Court in *Buckley* did not dispute that the $25,000 limit at issue there "impose[d] an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." 424 U.S. at 38. Notwithstanding that "modest restraint," it upheld the aggregate limit against substantially the same constitutional challenge that appellants assert in this case. *Ibid.* That holding remains good law, and it required the dismissal of appellants' complaint.

CONCLUSION

The appeal should be dismissed for want of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

ANTHONY HERMAN
General Counsel
LISA J. STEVENSON
Deputy General Counsel
DAVID KOLKER
Associate General Counsel
ADAV NOTI
Acting Assistant General Counsel
Federal Election Commission

JANUARY 2013

OPPOSITION

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JAN 14 2013
OFFICE OF THE CLERK

No. 12-536

In The
Supreme Court of the United States

Shaun McCutcheon and Republican National Committee, *Plaintiffs-Appellants*

v.

Federal Election Commission

On Appeal from the United States District Court
for the District of Columbia

Brief Opposing Motion to Dismiss or Affirm

Stephen M. Hoersting
Dan Backer
DB CAPITOL STRATEGIES, PLLC
Suite 2109
209 Pennsylvania Ave., SE
Washington, DC 20003

Jerad Wayne Najvar
NAJVAR LAW FIRM
Suite 100
1 Greenway Plaza
Houston, TX 77046
Of Counsel for McCutcheon

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/235-3685 facsimile
jboppjr@aol.com
Counsel for Appellants

January 14, 2013

Library of Congress
Law Library

Table of Contents

The Questions Presented Are Substantial. 1

I. The Biennial Limit on Contributions to Non-Candidate Committees Is Unconstitutional for Lacking a Cognizable Interest as Applied to Contributions to National-Party Committees.. 1

II. The Biennial Limit on Contributions to Candidates Is Unconstitutional for Lacking a Constitutionally Cognizable Interest.. . 11

Conclusion. 13

Table of Authorities

Cases

Buckley v. Valeo, 424 U.S. 1 (1976). . . . 1-6, 8-11, 13

California Medical Association v. FEC, 453 U.S. 182 (1981). 7

Citizens United v. FEC, 130 S.Ct. 876 (2010) 2, 6-8, 11

FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001). 7, 9

FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007) 7

Constitutions, Statutes, Regulations & Rules

U.S. Const. amend. I. 2, 6

The Questions Presented Are Substantial[1]

I.

The Biennial Limit on Contributions to Non-Candidate Committees Is Unconstitutional for Lacking a Cognizable Interest as Applied to Contributions to National-Party Committees.

What was FEC[2] required to show to meet its burden of proving a cognizable interest supporting the biennial limit as applied to national-party committees? It needed to show a *specific* risk of *circumvention*. *See Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (stating interest as "evasion of the [base] contribution limitation" and positing a specific mechanism under now-altered law). J.S.7 n.2, 9, 17.

FEC could not prove a *specific* circumvention risk with *generalized*, speculative allegations of possible circumvention, nor could it prove an anti-*circumvention* interest by relying on an inapplicable anti-*corruption* (or anti-corruption-*appearance*) interest, J.S.15-16, or with non-cognizable gratitude, access, influence, or equalizing "interests," as the lower court attempted, J.S.16-17, 24-28.

---

[1] The Jurisdictional Statement established that all questions presented are substantial. Given word limits, Appellants here focus on their challenges to the biennial limits on contributions to national-party committees and candidates.

[2] Appellants employ abbreviations established in their Jurisdictional Statement ("J.S.") and FEC's Motion to Dismiss or Affirm ("Mot.").

Rather, FEC needed to show a cognizable risk that a cognizable *conduit-contribution* to a candidate could *actually result* from an individual's unearmarked, base-limit contribution to a national-party committee, given proper pro-rata attribution, J.S.22-23, and the anti-circumvention prophylaxes, including

- affiliation rules preventing political-committee proliferation, J.S.13-14, 18,
- base limits on contributions to and by candidates, political-party committees, and PACs, J.S.12-13, 18-20, and
- earmarking rules, J.S.20, 26-28.

Were the FEC able to prove that *some* attributable conduit-contribution could make it from an individual to a candidate through a base-level contribution to a national-party committee, FEC would need to show that the conduit-contribution would be *cognizable*, i.e., that it would be "'large'" enough (based on a pro-rata share of permissible contributions to and by an alleged conduit entity) to trigger the anti-quid-pro-quo-corruption interest, J.S.17 (quoting *Buckley*, 424 U.S. at 26),[3] and sufficient to justify the burden on First Amendment rights. Under *Buckley*'s analysis, individuals must be able to get "massive" contributions to specific candidates by "huge" contributions to political parties, 424 U.S. at 38, which FEC has not shown is possible after the post-*Buckley* FECA amendments, J.S.17-19.[4]

---

[3] *See also Citizens United v. FEC*, 130 S.Ct. 876, 908 (2010) ("large contributions" trigger quid-pro-quo-corruption risk).

[4] Given FEC's failure to prove a *specific* conduit-contribution risk, the facts that there are more PACs today and

(continued...)

The post-*Buckley* base limits on contributions to national-party committees already address the anti-*circumvention* interest because, since the contributions are not to a *candidate*, they don't pose a quid-pro-quo-corruption risk, J.S.7 n.2, and so are necessarily based on the anti-circumvention interest. J.S.15-16. The Conference Report on the post-*Buckley* FECA amendments expressly says that the new base limits on contributions to non-candidate committees "'restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to candidates.'" J.S.13 (citation omitted). Consequently, in enacting the base limits, Congress made the determination that contributions to parties at these levels satisfied its interest in preventing circumvention, J.S.18-19,[5] i.e., "massive" conduit-contributions could no longer travel to a candidate by reason of "huge" contributions to party committees.

---

[4] (...continued)
that some identify favored candidates online, Mot.12, prove nothing. Anyway, as applied here, there are not many more *national-party* committees, and parties have always openly favored their own candidates, despite which *Buckley* required that contributions to parties be "huge" to pose a possible circumvention risk, 424 U.S. at 38.

[5] FEC argues that Congress's establishment of a base limit reflects no "implicit determination that contributions below those limits pose no [circumvention] risk"; rather, those "limits strike a balance." Mot.12-13. But the Conference Report expressly said that the base limits were to "restrict . . . circumvention." By setting a base limit, Congress asserted its anti-circumvention interest only to that point, making the interest non-cognizable beyond that point. A non-cognizable interest is correctly considered as no interest, so doing an action posing no cognizable risk many times creates no risk. *Compare* Mot.12 *with* J.S.19.

So how does FEC attempt to meet this burden of proving a specific circumvention risk? How does it try to prove a cognizable risk that a cognizable conduit-contribution can actually make it from a contributor through a national-party committee to an intended candidate, given base limits, pro-rata attribution, and other prophylaxes, and absent earmarking?

FEC attempts to meet this burden by positing "[a] particularly effective circumvention technique." Mot. 11. But as shall be shown, FEC's posited mechanism is at odds with this Court's posited mechanism in *Buckley* and so fails.

FEC first acknowledges that though the "[biennial] limit was previously the only check on '*huge* contributions' to a single political committee or political party, FECA now contains specific limits that *more directly address that concern*." Mot.11 (emphasis added). Despite these FEC concessions that (a) the posited circumvention mechanism that this Court identified in *Buckley*, 424 U.S. 1, required "huge" contributions to a political party, *id.* at 38, (b) base limits eliminate such "huge" contributions, and (c) base limits are better tailored for this purpose than biennial limits, FEC posits that a "[a] particularly effective circumvention technique" identified in *Buckley* remains—"donat[ing] money to many different entities, each of which could then make its own contribution to the candidate." Mot.11-12.

But FEC's description of *Buckley*'s suggested "circumvention technique" is wrong for ignoring what was *central* to *Buckley*'s suggested circumvention technique—the ability to "contribute *massive* amounts of money *to a particular candidate* through the use of *unearmarked* contributions to political committees

likely to contribute to that candidate, or *huge* contributions to the candidate's political party." 424 U.S. at 38 (emphasis added). FEC's acknowledgment that "huge contributions" to a party are no longer possible because of post-*Buckley* "specific limits" (Mot.11) is incompatible with its claim that *Buckley*'s suggested "circumvention technique" survives as applied to national-party committees.

FEC fails to discuss the actual *operation* of those "specific limits," enacted to restrict circumvention, which fixed the problems that *Buckley* identified and thereby eliminated any possible effectiveness of that circumvention technique, J.S.12-14. Consequently, FEC makes no effort to show what it must prove to support the biennial limit as applied to national-party committees—a *specific* circumvention risk.[6] FEC does argue that "multiple contributions create the risk that an individual . . . can circumvent the base limits by channeling his money in such a way that a particular target is likely to receive much more than the base limits." Mot.13. In support, FEC points to *Buckley*'s posited mechanism of "contributing to political committees likely to contribute to a particular candidate." Mot.13. But this ignores *Buckley*'s emphasis on "massive" conduit-contributions and is a mere generalized assertion of a circumvention risk. FEC again fails to show *how* an unearmarked, base-level contribution to a

---

[6] Given FEC's failure to show a cognizable risk that a cognizable *conduit-contribution* to a candidate could actually result from an individual's unearmarked, base-limit contribution to a national-party committee, there is nothing to trigger any *anti-corruption* interest because that interest involves only the quid-pro-quo-corruption risk, which is solely about contributions *to candidates*. J.S.15-16.

national-party committee can make it to a particular candidate as a conduit-contribution, given pro-rata attribution, earmarking rules, and the other prophylaxes all in place absent the biennial limits. FEC's mere recitation of "channeling" and "transfers" without more, Mot.13, fails its burden in light of the post-*Buckley* FECA amendments.

Failing to show what it must—a cognizable conduit-contribution risk—FEC makes tangential arguments.[7]

FEC argues that the biennial limits, as applied, are justified by the "anti-corruption purpose" of preventing "'improper influence' . . . over the party's elected officials" by "'an individual [who] might contribute $3.5 million to one party, and its affiliated committees in a single election cycle.'" Mot.13 (citations omitted). This is wrong on multiple levels. FEC must show an anti-*circumvention* interest, not an anti-*corruption* interest, *Buckley*, 424 U.S. at 38 ("evasion"); FEC's switch to a corruption theory virtually concedes that it has failed to prove a conduit-contribution risk. *Buckley*'s concern was about "massive" *conduit-contributions* getting through parties (from "huge" contributions to a party) to candidates, not some vague "influence." *Id.* And "influence" is a forbidden theory of "corruption" (or its appearance). "When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption." *Citizens United*, 130 S.Ct. at 909. "Reliance on a 'generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and sus-

---

[7] FEC's failure to show a "circumvention mechanism," Mot.11-12, makes FEC's tangential arguments insufficient, though some are addressed.

ceptible to no limiting principle.'" *Id.* at 910 (citation omitted). FEC's implicit refusal here to be governed by *Citizens United* is made express when FEC asserts that "Appellants' reliance on *Citizens United* [for the legal proposition that cognizable corruption is limited to quid pro quo] is misplaced." Mot.17 n.2. FEC's argument demonstrates—without more required—that this question is substantial and should be fully briefed and decided, in part to clarify FEC's position and for this Court to reaffirm its *Citizens United* holding in this context.

FEC argues that a plurality and concurrence in *California Medical Association v. FEC*, 453 U.S. 182 (1981) ("*CMA*"), recognized that unlimited donations to a PAC could allow circumvention of the base and biennial limits. Mot.14. But FEC misses the very point of the case, i.e., that the base limit was enacted and upheld precisely to *foreclose* that circumvention. J.S.12-14. The base limit remaining in place, the circumvention risk of which *CMA* spoke remains foreclosed by that base limit.[8] The same is true of FEC's argument that *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"), recognized a circumvention risk, Mot.18, while ignoring the fact that the case upheld a limit on party expenditures to *foreclose* that circumvention. J.S.23 n.8.

FEC disputes Appellant's use of "prophylaxis-on-prophylaxis" (from *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007)) to describe FECA's anti-circum-

---

[8] The biennial limit was not at issue in *CMA*, so FEC's argument that "a majority" "recognized" that base and biennial limits can coexist is at best dicta. But FEC must prove each limit is supported by a cognizable interest. FEC's burden is not foreclosed by non-court-opinion dictum.

vention scheme. Mot.15. Appellants have already addressed the fact that such a redundant approach is foreclosed by the tailoring requirement under *either* strict or intermediate scrutiny, J.S.17, which FEC fails to note. Under either scrutiny, if one prophylaxis addresses an asserted interest, that interest may not be recycled to justify another prophylaxis. J.S.17.

FEC argues that the biennial limits aren't really "prophylaxis-on-prophylaxis" because the base limits aren't prophylactic. Mot.16. *Citizens United* said otherwise: "[R]estrictions on direct contributions are preventative, because few if any contributions to candidates will involve *quid pro quo* arrangements." *Citizens United*,130 S.Ct. at 908.

And FEC's resort to a broadly conceived "appearance of corruption" interest, Mot.16 (in a curious argument that FECA does not contain layers of prophylaxes to prevent circumvention), is another rejection of *Citizen United*'s restriction of cognizable "corruption" to quid pro quo—which necessarily requires that any cognizable corruption-appearance interest must entail the appearance of quid-pro-quo corruption (which is not really at issue here anyway because an anti-circumvention interest is required to support biennial limits).

Buckley's statement that the biennial limit was a "corollary" of the sole base contribution limit then in effect, 424 U.S. at 38, doesn't help FEC, Mot.17, because the statement applied to a now-altered FECA scheme, J.S.12-14. Since the "ceiling" in *Buckley* actually was a *base* limit for contributions to non-candidate committees, J.S.7, it was a corollary of a base limit in that respect. But post-*Buckley* FECA amendments changed that. J.S.12-14.

Nonetheless, *Buckley* yet required a mechanism for "massive" conduit-contributions. That mechanism was eliminated by the post-*Buckley* FECA amendments, 424 U.S. at 38, so FEC must yet prove such a mechanism.

FEC argues that *Buckley* recognized a circumvention risk from "unearmarked contributions." Mot.17-18. But that was based on a posited circumvention mechanism allowing "massive" conduit-contributions to make it to candidates under now-altered FECA provisions. J.S.9-11. And the recognition in *Colorado-II*, 533 U.S. 431, that earmarking was not the limit of the government's permissible anti-circumvention measures, Mot.18, does not eliminate the fact that FECA *has* many anti-circumvention measures (including the party-expenditure limit upheld in *Colorado-II*, J.S.23 n.8), and FEC has not proved that the biennial limits are supported by an anti-circumvention interest after the operation of those other prophylaxes.

Appellants argued that the biennial limit really relies on a forbidden equalizing interest. J.S.24. FEC claims "*Buckley* recognized that contribution limits . . . are not speech-equalizing measures." Mot.18 (citing 424 U.S. at 25-26 & n.26). *Buckley* recorded the government's asserted equalizing interest in support of the $1,000 base limit on contributions to candidates. This Court later rejected that interest, 424 U.S. at 48-49, but found it "unnecessary" to consider the asserted equalizing interest because the anti-corruption interest was sufficient to support the base limit, *id.* at 26. *Buckley* did note that "[c]ontribution limitations *alone* would not reduce the greater potential voice of affluent persons . . . who would remain free to spend unlimited sums directly to promote candidates," *id.* at 26 n.26

(emphasis added), but that does not say that contribution limits cannot be employed to pursue the illegitimate equalizing interest, as the government asserted it was doing. Rather, *Buckley* merely said that the base limit "alone" would not fully achieve the leveling objective. But where, as here, a limit is not justified by any anti-corruption or anti-circumvention interest, that forbidden equalizing interest stands exposed and must be rejected.

FEC argues that strict scrutiny is inapplicable because *Buckley* recognized that the old biennial ceiling "'does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support,' but did not apply strict scrutiny." Mot.10 (quoting 424 U.S. at 38). *Buckley* did not state what scrutiny it applied, and FEC's assumption that it applied scrutiny applicable to contributions *assumes* the answer to whether biennial limits should be treated more like expenditures than contributions for scrutiny purposes. *Buckley*'s observation of the association-limiting effect of the ceiling does not address what scrutiny ought to apply, but its observation that the ceiling *does* limit association counters any notion that it does *not*, because the true focus is on how many recipients one may associate with at the *full* base-contribution level, not at de minimis amounts. Anyway, the level of scrutiny ought to be higher than that for base-level contributions because the biennial limit is different in kind and more serious. J.S.8-9. But ultimately it doesn't matter which scrutiny applies because FEC fails to show the necessary anti-circumvention interest, required under any scrutiny. J.S.5-9.

Notably, FEC *abandons* arguments central to the lower-court opinion, including the court's

- posited interest based on a contributor's ability to "give half-a-million dollars in a single check to a joint fundraising committee," amounting to an equalizing interest, J.S.26 (citation omitted),
- wreath-of-gratitude interest, J.S.26 (citation omitted), and
- speculative "mechanism for circumvention rel[ying] on individuals violating the [earmarking] law," J.S.26-27.

Being abandoned, these should not be considered. *Cf. Citizens United*, 130 S.Ct. at 908, 912 (FEC abandoned anti-distortion-interest argument).

In sum, FEC fails to show that *Buckley* forecloses this as-applied challenge or that—given *Buckley*'s analysis and FEC's failure to show a cognizable circumvention risk from allowing base-level contributions to national-party committees without biennial limits—this question is insubstantial.

II.

The Biennial Limit on Contributions to Candidates Is Unconstitutional for Lacking a Constitutionally Cognizable Interest.

FEC had to show a *specific* risk of *circumvention* to support the biennial limit on contributions to candidates. *See* Part I. The court below ignored this challenge, despite its unique nature, the important distinctions between the two claims here, the fact that the two biennial limits don't rise or fall together, and the fact that *Buckley* didn't even posit a mechanism by which contributions to candidates could pose a circumvention risk by allowing "massive" conduit-contribu-

tions to reach candidates as a result of base-level contributions to candidates. J.S.5, 32-37.

FEC claims there is a conduit-risk, but fails to prove a specific mechanism, given the existing prophylaxes absent the biennial limits. The core of FEC's argument is that "a contributor can give [$2,500 per election] each to a number of candidates who . . . can give to one candidate (or . . . party)." Mot.20. That is true but fails FEC's burden to show a specific, cognizable conduit-contribution risk. Applying *Buckley*'s analysis, $2,500 is not a "huge" contribution to put in the purported conduit, candidates are not proven to be "likely" to give to certain other candidates, there is no proliferation of candidate committees, and earmarking is illegal, so there is no cognizable risk that such modest base-level contributions permit individuals to "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions" to other candidates. 424 U.S. at 38. *See* J.S.33-34. This is especially true given the necessary *pro-rata attribution* of contributions to and by candidates, which FEC studiously avoids in its brief. Congress already asserted its anti-circumvention interest to the extent of a $2,000 (per election) limit on contributions from one candidate committee to another. J.S.33. FEC's reference to a "tally" system once used by a state party not involved here, Mot.20, proves nothing. There is no evidence here that any candidate to which Mr. McCutcheon contributes makes contributions to any other candidate or to any political party, let alone one that keeps such a "tally." And to the extent such a system relies on forbidden "influence" and "gratitude" theories of corruption, it would be non-cognizable.

In sum, no proven anti-circumvention interest justifies a biennial restriction. FEC fails to show that *Buckley* forecloses this challenge or that the issue is insubstantial.

Conclusion

This Court should note probable jurisdiction.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/235-3685 facsimile
jboppjr@aol.com
Counsel for Appellants

Stephen M. Hoersting
Dan Backer
DB CAPITOL STRATEGIES, PLLC
Suite 2109
209 Pennsylvania Ave., SE
Washington, DC 20003

Jerad Wayne Najvar
NAJVAR LAW FIRM
1 Greenway Plaza, Ste.100
Houston, TX 77046
Of Counsel for McCutcheon

January 14, 2013

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
MAY 6 - 2013
OFFICE OF THE CLERK

No. 12-536

In the
Supreme Court of the United States

SHAUN MCCUTCHEON AND
REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,
v.
FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANT SHAUN MCCUTCHEON

Dan Backer
Paul Henry Jossey
DB CAPITOL STRATEGIES, PLLC
Suite 2109
209 Pennsylvania Ave. SE
Washington, DC 20003

Michael T. Morley
Counsel of Record
223 Pawnee Rd.
Cranford, NJ 07016
(860) 778-3883
michaelmorleyesq@hotmail.com

Jerad Wayne Najvar
NAJVAR LAW FIRM
1 Greenway Plaza, Ste. 100
Houston, TX 77046

Counsel for Plaintiff-Appellant Shaun McCutcheon

May 6, 2013

QUESTION PRESENTED

Do the Bipartisan Campaign Reform Act's aggregate limits on the total amount that an individual may contribute to all federal candidates, political party committees, and other political committees during a two-year federal election cycle, 2 U.S.C. § 441a(a)(3)(A)-(B), violate the First Amendment?

PARTIES TO THE PROCEEDING

Appellants in this case are Shaun McCutcheon and the Republican National Committee ("RNC").

Appellee is the Federal Election Commission ("FEC").

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
A. Aggregate Contribution Limits Under the Federal Election Campaign Act of 1971 2
B. Aggregate Contribution Limits and Current Campaign Finance Law 5
C. The Proceedings Below 11
D. The District Court's Decision 14
SUMMARY OF ARGUMENT 17
ARGUMENT 20
I. AGGREGATE CONTRIBUTION LIMITS SUBSTANTIALLY BURDEN FIRST AMENDMENT RIGHTS AND ARE SUBJECT TO RIGOROUS REVIEW 20
A. Contribution Limits Substantially Burden Fundamental First Amendment Rights 21
B. Aggregate Contribution Limits Infringe First Amendment Rights in Especially Pernicious Ways 24

C. The Government Bears a Particularly Heavy Burden in Justifying this Substantial Restriction on Core First Amendment Rights 31

II. BCRA'S AGGREGATE CONTRIBUTION LIMITS DO NOT FURTHER ANY CONSTITUTIONALLY PERMISSIBLE GOVERNMENT INTEREST 34

A. Aggregate Contribution Limits Do Not Directly Prevent Corruption or the Appearance of Corruption 35

B. BCRA's Aggregate Contribution Limits Do Not Prevent Circumvention of Anti-Corruption Measures 39

1. In the Years Since *Buckley*, Congress Has Eliminated the Need for Aggregate Contribution Limits as Anti-Circumvention Measures 40

2. The Government's Efforts to Portray BCRA's Aggregate Limits as Anti-Circumvention Measures Rest on Pure Speculation with No Factual Support 44

3. The Aggregate Contribution Limits Do Not Prevent Any Cognizable Risk or Appearance of Corruption 48

III. EVEN ASSUMING THAT AGGREGATE CONTRIBUTION LIMITS FURTHER A LEGITIMATE INTEREST, THEY ARE NOT SUFFICIENTLY TAILORED 55

CONCLUSION 62

STATUTORY APPENDIX

U.S. Const. amend. I 1a
2 U.S.C. § 441a(a) 2a
2 U.S.C. § 441f 8a
18 U.S.C. § 608 (1970 ed., Supp. IV) 9a
11 C.F.R. § 100.5(g) 19a
11 C.F.R. § 110.4(b) 23a
11 C.F.R. § 110.5 ..... 24a
11 C.F.R. § 110.6 ..... 27a

TABLE OF AUTHORITIES

Cases

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) 22

Arizona Free Enter. Club's Freedom Club PAC v. Bennett,
131 S. Ct. 2806 (2011) ..... *passim*

Austin v. Michigan State Chamber of Commerce,
494 U.S. 652 (1990) 39

Buckley v. Valeo,
424 U.S. 1 (1976) ..... *passim*

Carey v. FEC,
791 F. Supp. 2d 121 (D.D.C. 2011) 6

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal.,
454 U.S. 290 (1981) ..... *passim*

Citizens United v. FEC,
558 U.S. 310 (2010) ..... *passim*

Colo. Republican Fed. Campaign Comm. v. FEC,
518 U.S. 604 (1996) 23, 32, 50, 56

Davis v. FEC,
554 U.S. 724 (2008) ..... *passim*

Eu v. San Francisco Cnty. Democratic Cent. Comm.,
489 U.S. 214 (1989) 30

FEC v. Colorado Republican Federal Election Comm.,
533 U.S. 431 (2001) 36, 47

FEC v. Mass. Citizens for Life, Inc.,
479 U.S. 238 (1986) 26, 39, 55, 59

FEC v. Nat'l Conservative Political Action Comm.,
470 U.S. 480 (1985) ..... *passim*

FEC v. Nat'l Right to Work Comm.,
459 U.S. 197 (1982) 21, 32

FEC v. Wisconsin Right to Life, Inc.,
551 U.S. 449 (2007) ..... *passim*

First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 47

McConnell v. FEC,
540 U.S. 93 (2003) 15, 36

Nixon v. Shrink Missouri PAC,
528 U.S. 377 (2000) ..... *passim*

Randall v. Sorrell,
548 U.S. 230 (2006) 23, 32, 33, 52

SpeechNow.org v. FEC,
599 F.3d 686 (D.C. Cir. 2010) 6

Storer v. Brown,
415 U.S. 724 (1974) 29, 31

Tashjian v. Republican Party of Conn.,
479 U.S. 208 (1986) 24, 29

Timmons v. Twin Cities Area New Party,
520 U.S. 351 (1997) 31

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994) 45

W. Coast Hotel Co. v. Parrish,
300 U.S. 379 (1937) 53

Constitutional Provisions

U.S. Const. art. I, § 2, cl. 1 31
U.S. Const. art. I, § 2, cl. 4 31

Statutes

2 U.S.C. § 431 ..... 13, 25
2 U.S.C. § 439a (1970 ed., Supp. IV) 4
2 U.S.C. § 441a ..... *passim*
2 U.S.C. § 441a-1(a) 26
2 U.S.C. § 441f 8, 43, 45
18 U.S.C. § 591 3
18 U.S.C. § 608 (1970 ed., Supp. IV) 2, 3, 4, 11
18 U.S.C. § 610 (1970 ed., Supp. IV) 3
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403, 116 Stat. 113 14
Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (Oct. 15, 1974) 2
Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972) 2
Ariz. Rev. Stat. Ann. § 16-905(E) (2012) 54
Conn. Gen. Stat. § 9-611(c) (2013) 54
D.C. Code § 1-1163.33(b)(1) 54
Mass. Gen. Laws ch. 55, § 7A(a)(5) (2013) 54
Md. Ann. Code § 13-226(b) (2013) 54
Me. Rev. Stat. Ann. tit. 21-A, § 1015(3) (2013) 54
N.Y. Laws [Elec.] § 14-114 (2012) 54
R.I. Gen. Laws § 17-25-10.1(a)(1) (2012) 54
Wash. Rev. Code § 42.17A.420 (2012) 54

Wis. Stat. § 11.26(4) (2013) 54

Wyo. Stat. Ann. § 22-25-102 (c)(ii) (2012) 54

Other Authorities

FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, Notice 2013-03, 78 Fed. Reg. 8,530, 8,532 (Feb. 6, 2013) 6

H.R. Rep. No. 94-1057 (1976) (Conf. Rep.) 8

National Conference of State Legislatures, *State Limits on Contributions to Candidates* (Jan. 20, 2010), *available at* www.ncsl.org/print/legismgt/limits_candidates.pdf 54

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia denying Appellants' motion for a preliminary injunction and dismissing the case is reported at 893 F. Supp. 2d 133 and reproduced in the appendix to the jurisdictional statement ("JS.App.") at JS.App.1a-17a. The district court's order granting final judgment to Appellee is reproduced at JS.App.17a.

JURISDICTION

The district court entered final judgment on September 28, 2012. Appellants filed a timely notice of appeal on October 10, 2012, and a jurisdictional statement on October 26, 2012. This Court noted probable jurisdiction on February 19, 2013. This Court has jurisdiction under § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 113-14.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, as well as the pertinent provisions of BCRA and the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972), as amended by the FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (Oct. 15, 1974), and the FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (May 11, 1976), are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

This case presents a constitutional challenge to aggregate limits on contributions to federal

candidates and political committees. Aggregate contribution limits restrict the total amount of money an individual may contribute to all candidates or all political committees during an election cycle. Congress enacted the first federal aggregate contribution limit in a very different regulatory era, as a way of indirectly addressing numerous avenues through which a person could circumvent the statutory limit on contributions to a single candidate. Over the past few decades, however, Congress has fundamentally altered campaign finance law, eliminating the very avenues for circumvention that aggregate limits purport to avert. In doing so, Congress has also eliminated any legitimate justification for the severe First Amendment burden that aggregate contribution limits impose.

A. Aggregate Contribution Limits Under the Federal Election Campaign Act of 1971

The Federal Election Campaign Act ("FECA") marked the federal government's first major foray into campaign finance regulation. *See* Pub. L. No. 92-225, 86 Stat. 3 (Feb. 7, 1972), as amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (Oct. 15, 1974). In an effort to respond to the scandalous corruption that had surfaced in the years preceding its enactment, FECA restricted both "contributions" to candidates for federal office and "expenditures" relating to a "clearly identified candidate." 18 U.S.C. §§ 608(b)-(c) (1970 ed., Supp. IV).

As to the former, FECA prohibited any person from contributing more than $1,000 per primary or

general election to a federal candidate. *Id.* §§ 591(a)(1), 608(b)(1), (b)(5). FECA defined the term "contribution" broadly to include "anything of value," thereby covering both cash and most in-kind gifts. *Id.* § 591(e)(1). Its anti-earmarking provision clarified that the statutory limits applied to all contributions made "directly or indirectly" to a candidate, including those that were "in any way earmarked" or "directed through an intermediary or conduit to such candidate." *Id.* § 608(b)(6).

FECA also prohibited political committees from contributing more than $5,000 per election to a federal candidate. *Id.* § 608(b)(2), (b)(5).[1] FECA defined a "political committee" as any committee, club, association, or other group that raised or spent more than $1,000 in a single year in connection with one or more federal elections. *Id.* § 591(d). A political committee could be formed by a national political party (*e.g.*, the RNC); a state or local political party; a candidate (typically referred to as the candidate's "principal campaign committee"); or like-minded individuals or groups (in which case the committee was referred to colloquially as a "political action committee" or "PAC").

---

[1] Although FECA generally prohibited corporations and labor unions from contributing to candidates and political committees, it allowed them to establish special affiliated political committees called "separate segregated fund[s]"—funded by voluntary contributions from corporate shareholders and executives, or union members, respectively—from which contributions could be made. 18 U.S.C. § 610 (1970 ed., Supp. IV).

Notably, FECA did not specifically limit the amount an individual could contribute to a particular political party committee or PAC, or how much a PAC could contribute to a party committee or some other PAC. Moreover, FECA did not prevent a single person or entity from establishing multiple political committees; a single entity could form an endless stream of political committees, each of which could contribute up to $5,000 to the same candidate, *see id.* § 608(b)(2). In the absence of some other statutory restriction, an individual therefore could have circumvented FECA's $1,000 per-candidate contribution limit by contributing up to $5,000 in unearmarked funds to as many such committees as he wished, which in turn could have re-contributed those funds to a particular candidate.[2]

To address the possibility that contributors might exploit these aspects of the system to circumvent the limits on contributions to candidates, FECA imposed an aggregate ceiling of $25,000 on the total amount of contributions that an individual could make in a single year to all candidates and non-candidate committees combined. *Id.* § 608(b)(3). In doing so, Congress effectively limited (albeit in a somewhat indirect way) how much an individual could contribute to a political party committee, PAC, or series of related PACs.

This Court upheld FECA's aggregate contribution ceiling in *Buckley v. Valeo*, 424 U.S. 1

---

[2] Surprisingly, FECA also allowed candidates to use political contributions for personal purposes unrelated to the campaign. *See* 2 U.S.C. § 439a (1970 ed., Supp. IV) (allowing contributions to be used for "any other lawful purpose").

(1976) (per curiam). The Court recognized that the ceiling burdened core First Amendment rights by "impos[ing] an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." *Id.* at 38. It also noted, however, that the ceiling helped prevent contributors from circumventing FECA's base contribution limits. Without the ceiling, the Court explained, a person could legally "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or [make] huge contributions to the candidate's political party." *Id.* Accordingly, although the Court emphasized that the issue had "not been separately addressed at length by the parties," it concluded that FECA's aggregate contribution ceiling could be upheld as "a corollary of the basic individual contribution limitation." *Id.*

B. Aggregate Contribution Limits and Current Campaign Finance Law

In the more than 35 years since this Court decided *Buckley*, Congress has substantially altered its regulatory scheme, most notably through the FECA Amendments of 1976 and BCRA, to foreclose the avenues *Buckley* identified for circumvention of per-candidate contribution limits. Under BCRA's intricate, multi-layered scheme of contribution limits, an individual may contribute:

- $2,600 per election to a federal candidate, 2 U.S.C. § 441a(a)(1)(A);
- $10,000 per year to a state or local political party committee, *id.* § 441a(a)(1)(D);

- $32,400 per year to a national political party committee, *id.* § 441a(a)(1)(B);[3] and
- $5,000 per year to any other political committee (PAC), *id.* § 441a(a)(1)(C).[4]

These individual limits often are referred to as "base limits."[5]

Congress also has strictly limited contributions from political party committees and PACs. National, state and local party committees, as well as multicandidate PACs, may contribute up to $5,000

---

[3] The six major national party committees are the Democratic National Committee ("DNC"), Republican National Committee ("RNC"), Democratic Senatorial Campaign Committee ("DSCC"), National Republican Senatorial Committee ("NRSC"), Democratic Congressional Campaign Committee ("DCCC"), and the National Republican Congressional Committee ("NRCC").

[4] Following this Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), an individual's contributions to a non-candidate, non-party political committee that makes independent expenditures (commonly referred to as a "Super PAC"), are not subject to contribution limits. *SpeechNow.org v. FEC*, 599 F.3d 686, 296 (D.C. Cir. 2010); *Carey v. FEC*, 791 F. Supp. 2d 121, 135 (D.D.C. 2011).

[5] BCRA itself established base limits lower than these on contributions to candidates and national party committees, but indexed them for inflation, leading to the higher figures specified above. *See* 2 U.S.C. § 441a(c)(1)(B). Its base contribution limits to state and local parties, and to other political committees, in contrast, are not indexed. The FEC announced the most recent limits, modified based on the consumer price index, on February 6, 2013. *See* FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, Notice 2013-03, 78 Fed. Reg. 8,530, 8,532 (Feb. 6, 2013).

per election to any particular candidate[6] or PAC. *Id.* § 441a(a)(2)(A), (C).[7] Additionally, a multicandidate PAC may contribute a maximum of $15,000 to a national party committee or $5,000 to a state or local party committee each year. *Id.* § 441a(a)(2)(B), (C).[8]

These restrictions are bolstered by anti-proliferation rules, enacted shortly after *Buckley* in the FECA Amendments of 1976, which prevent individuals and entities from establishing multiple

---

[6] One exception to this rule is that the national party committees and corresponding national senatorial campaign committees (*i.e.* the RNC and NRSC, or the DNC and DSCC) are collectively permitted to contribute a combined total of $35,000, indexed for inflation (currently $45,400), to a Senate candidate. 2 U.S.C. § 441a(h).

[7] Base limits on contributions from PACs and political party committees generally are not indexed for inflation. Non-multicandidate PACs are subject to most of the same base contribution limits as individuals, *see* 2 U.S.C. § 441a(a)(1)(A), although the aggregate limits do not apply to them, *id.* § 441a(a)(3).

[8] Although, as noted above, BCRA limits the amount that a national, state, or local political party committee may contribute to each candidate, 2 U.S.C. § 441a(a)(2)(A), political party committees of the same party may transfer unlimited amounts of funds to each other, *id.* § 441a(a)(4). Additionally, the national committee of each political party (*i.e.*, the DNC and RNC), as well as each party's state committees, may make a certain amount of coordinated expenditures with federal candidates "who [are] affiliated with such party." *Id.* § 441a(d)(1)-(3). These coordinated expenditures do not count against that party committee's base contribution limits to those candidates. *Id.* § 441a(d)(1). The exact amount of a national or state party committee's coordinated spending authority for each of its candidates is determined by a statutory formula. *Id.* § 441a(d)(2)-(3).

PACs in order to circumvent base limits. Under these rules, all contributions made by all political committees established, financed, maintained, or controlled by the same corporation, labor union, or other person—"including any parent, subsidiary, branch, division, department, or local unit" of any such entity—are "considered to have been made by a single political committee." *Id.* § 441a(a)(5). Thus, for example, all PACs set up by the AFL-CIO and its state and local bodies, or by state and local Chambers of Commerce, now "are treated as a single political committee." H.R. Rep. No. 94-1057, at 58 (1976) (Conf. Rep.). Additionally, federal law now prohibits candidates from "convert[ing]" campaign contributions "to personal use." 2 U.S.C. § 439a(b)(1). And a person may not evade any contribution limits by making a contribution using someone else's name or funds. *Id.* § 441f.

These fundamental changes in campaign finance law have eliminated *Buckley*'s rationale for upholding FECA's aggregate contribution ceiling. Because Congress now (among other things) directly limits the amount an individual may contribute to each political party committee or PAC and treats related PACs as a single entity, a person no longer may legally "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or [make] huge contributions to the candidate's political party." *Buckley*, 424 U.S. at 38. In other words, aggregate contribution limits are no longer needed to foreclose an otherwise-lawful method of circumventing per-candidate contribution limits.

Nevertheless, rather than doing away with this relic, BCRA imposed a new, more robust set of aggregate limits *on top of* its base contribution limits. Under BCRA, an individual currently may contribute a total of $48,600 to all federal candidates combined, *see* 2 U.S.C. § 441a(a)(3)(A),[9] and a total of $74,600 to all non-candidate political committees (*i.e.*, national party committees, state and local party committees, and PACs) combined, *see id.* § 441a(a)(3)(B), in any two-year federal election cycle.[10] Of the $74,600 that an individual may give to non-candidate committees, no more than $48,600 may be contributed to state and local party committees or PACs, *id.* § 441a(a)(3)(B). BCRA thus imposes the following aggregate limits on individuals for the current federal election cycle:

---

[9] All of BCRA's aggregate contribution limits are indexed for inflation. *See supra* note 4.

[10] A federal election cycle "begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year." 2 U.S.C. § 441a(a)(3).

Total contributions to candidate committees 2 U.S.C. § 441a(a)(3)(A)	$48,600
Total contributions to non-candidate political committees 2 U.S.C. § 441a(a)(3)(B)	$74,600
Total contributions to *any* non-candidate committees 2 U.S.C. § 441a(a)(3)(B)	$48,600
Additional amount that may be contributed *only* to national party committees	$26,000
TOTAL BIENNIAL LIMITS ON POLITICAL CONTRIBUTIONS	$123,200

Congress enacted these aggregate contribution limits *in addition to* the base limits on how much a person may contribute to any particular candidate, national party committee, state or local party committee, or PAC. Aggregate limits therefore prevent people from giving an otherwise permissible amount of money that Congress did not believe raised corruption-related concerns to "too many" different candidates or committees. For instance, under BCRA, an individual may contribute up to $5,200 to a single candidate in the current federal election cycle ($2,600 for both the primary and general elections) without creating a risk of corruption or the appearance of corruption that Congress deemed necessary to combat. *See* 2 U.S.C. § 441a(a)(1)(A); 78 Fed. Reg. at 8,532 (announcing current limits based on inflation). But if a person

contributes that same amount to more than nine different candidates for federal office, she would violate BCRA's $48,600 aggregate candidate contribution limit.[11] Similarly, while BCRA ostensibly permits a person to contribute up to $32,400 to a national party committee in every election cycle, its $74,600 aggregate limit on contributions to non-candidate committees means that a person may contribute the maximum amount to only two such committees.

C. The Proceedings Below

1. Appellant Shaun McCutcheon holds firm convictions about the proper role of government and the importance of ensuring that elected officials adhere to constitutional limitations on their authority. Compl. ¶ 22 (Doc. 1). He opposes numerous "ill-conceived and overreaching laws" and wishes to both express his support for and facilitate the election of federal officeholders who share his beliefs and will seek to advance them legislatively. *Id.* ¶¶ 22-24.

As of June 18, 2012, when the complaint in this case was filed, McCutcheon had contributed a total of $33,088 during the 2012 election cycle in congressional races across the nation—$1,776 to each of 15 challengers attempting to unseat incumbents. *Id.* ¶¶ 26-27. Each contribution complied with BCRA's base candidate contribution limit. *Id.* ¶ 29.

---

[11] Under FECA as originally passed, in contrast, a person could contribute the full statutory amount of $2,000 to 12 different candidates without exceeding the aggregate contribution ceiling of $25,000. *See* 18 U.S.C. § 608(b)(1), (3) (1970 ed., Supp. IV).

McCutcheon also wished to contribute $1,776 to 12 other candidates for Congress, mostly non-incumbents interested in advancing the cause of liberty. Doing so, however, would have violated the aggregate candidate contribution limit of $48,600 per election cycle. *Id.* ¶¶ 28-30. Accordingly, BCRA's aggregate contribution limit prevented McCutcheon from associating with, demonstrating his support for, and assisting numerous candidates for federal office whom he believed share his political philosophy, and whose messages he embraced. *Id.* ¶¶ 30-33.

As of June 2012, McCutcheon also had contributed $1,776 to the RNC, the NRSC, and the NRCC, and a total of $27,328 to several other non-candidate committees during the 2012 election cycle. *Id.* ¶¶ 35-36. He did not earmark these contributions in any way. *Id.* ¶ 37. McCutcheon wished and intended to make further contributions to various non-candidate committees, including an additional $25,000 to each of the three Republican national party committees, which would have been permissible under BCRA's $32,400 base limit on contributions to national parties. *Id.* ¶¶ 37-38. He was unable to do so, however, because such contributions would have violated BCRA's $74,600 aggregate limit on contributions to non-candidate political committees. *Id.*

McCutcheon presently wishes to contribute a total of more than $60,000 to candidates intending to run in the 2013-14 election cycle, as well as a total of at least $75,000 to the three Republican national party committees, but BCRA's aggregate contribution limits prohibit him from doing so. *Id.* ¶¶ 32, 33, 38.

2. Appellant RNC is a national political party committee under federal law. 2 U.S.C. § 431(14). *The Rules of the Republican Party* charge the RNC with "the general management of the Republican Party, based upon the rules adopted by the Republican National Convention." Compl. ¶ 12. The RNC also promotes issue positions and supports candidates for office, with its primary electoral emphasis on presidential elections. *Id.* ¶ 44.

Although a core part of the RNC's mission, direct support to candidates makes up a relatively small portion of the RNC's overall spending. For example, during the 2012 presidential election, the RNC spent a total of $386,180,565, of which it contributed approximately 0.07% percent to candidates, and spent approximately 5.8% for coordinated expenditures with specific candidates (97% of the RNC's coordinated spending was on behalf of the party's presidential nominee).[12] In the 2009-10 non-presidential election cycle, the RNC spent a total of $210,769,855, of which approximately 0.03% was spent on direct candidate contributions, and 0.5% was spent on coordinated expenditures.[13]

The RNC wishes to receive the contributions McCutcheon would have made, and would make in the future, but for BCRA's aggregate limit on contributions to non-candidate committees. *Id.* ¶ 41. The RNC also has had to decline or refund contributions from other individuals that were

---

[12] *See supra* note 8.

[13] These figures are available at http://www.fec.gov/finance/disclosure/candcmte_info.shtml.

permissible under the base national party contribution limit, but illegal under the aggregate limits. *Id.* ¶ 40.

3. On June 22, 2012, Appellants filed a five-count complaint before a three-judge panel of the U.S. District Court for the District of Columbia, pursuant to BCRA's special judicial review provisions, *see* BCRA, § 403, 116 Stat. 113-14. They alleged, among other things, that BCRA's aggregate limits on contributions to candidates (Count 4) and non-candidate committees (Count 2) are facially unconstitutional under the First Amendment. They also alleged that BCRA's aggregate non-candidate committee contribution limit is unconstitutional as applied to national political party committees, such as the RNC (Count 1). Accordingly, Appellants sought a preliminary injunction against enforcement of the challenged provisions. The FEC moved to dismiss the case.

D. The District Court's Decision

The panel held a consolidated hearing on the cross-motions, denied the preliminary injunction, and granted the FEC's motion to dismiss the case. JS.App.1a-17a. Notwithstanding the massive changes in campaign finance law since *Buckley* that now directly prevent circumvention of the base candidate contribution limit, the court concluded that BCRA's aggregate contribution limits are a valid anti-circumvention measure. JS.App.13a.

After acknowledging the "possibility that *Citizens United* undermined the entire contribution limits scheme," the court began its analysis by stating that limits on campaign contributions are

subject to a "lower" level of constitutional scrutiny "because they primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational rights in other ways." JS.App.8a, 16a. According to the court, Congress may abridge this core First Amendment right so long as its restrictions are "'closely drawn to match a sufficiently important interest.'" JS.App.6a (quoting *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (internal quotation marks omitted), *overruled in part on other grounds by Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010)).

The court noted that Congress has an "important interest" in preventing corruption, the appearance of corruption, and "circumvention of contribution limits imposed to further [those] anticorruption interest[s]." JS.App.9a. In the court's view, Congress' interest in combating corruption is not limited to bribery or *quid pro quo* arrangements, but also extends to preventing elected officials from "acting contrary to their representative obligations." JS.App.10a.

Turning to BCRA's aggregate contribution limits, the district court acknowledged that the avenue for circumvention this Court identified in *Buckley* no longer exists, JS.App.2, but hypothesized a new, rather convoluted avenue of circumvention that aggregate limits theoretically might help to foreclose. According to the court, without aggregate limits, conniving actors might form a joint fundraising committee "comprising a party's presidential candidate, the party's national party committee, and most of the party's state party committees," and a person "might" decide to contribute a half-million

dollar check to this hypothetical entity. JS.App.12a. Since local, state, and national political party committees "may transfer unlimited amounts of money" to each other, JS.App.12a (citing 2 U.S.C. § 441a(a)(4)), the court speculated that the various individual committees comprising this hypothetical joint fundraising committee "might" decide to transfer their shares of the contribution to a single party committee. JS.App.12a. The recipient committee, in turn, "might use th[at] money for coordinated expenditures" in consultation with a candidate. JS.App.12a. And that candidate, in turn, might feel "gratitude" toward the original contributor. JS.App.12a.

The court acknowledged that this daisy chain of events is rather far-fetched, as it is "unlikely that so many separate entities would willingly serve as conduits for a single contributor's interests." JS.App.12a. But because the court could "imagine" such a situation, it concluded that BCRA's aggregate limits are constitutional. JS.App.12a.

In doing so, the court recognized the severe burden that aggregate contribution limits impose on First Amendment rights. For example, it pointed out that if a person wished to contribute to one candidate in all 468 federal races (435 House races and 33 Senate races) in 2006, "he would be limited to contributing $85.29 per candidate for the entire election cycle." JS.App.14a. The court was not troubled by the resulting burden on constitutional rights, however, because it was satisfied that "individuals remain able to volunteer, join political associations, and engage in independent

expenditures." JS.App.15a. Accordingly, the court denied Appellants' motion for a preliminary injunction and dismissed the case.

SUMMARY OF ARGUMENT

BCRA's aggregate contribution limits impose an unconstitutional burden on core First Amendment activity. Aggregate contribution limits are a relic of a past era of campaign finance regulation and should have been discarded years ago. Because the circumvention problem they were originally designed to target no longer exists, aggregate limits are now left prohibiting constitutionally protected activity for no permissible reason. They are fundamentally incompatible with the First Amendment and cannot survive any meaningful concept of rigorous scrutiny.

While all contribution limits burden core First Amendment rights, aggregate contribution limits are far more invasive than base contribution limits that limit the amount a person may contribute to a particular candidate, political party committee, or PAC. Aggregate limits operate to prevent an individual from associating with, expressing support for, and assisting "too many" candidates, political party committees, or PACs in a single election. A limit on *how many* candidates or entities someone may associate with or support is fundamentally different in kind from a limit on *how much* someone may support or associate with any particular candidate or entity. The government therefore bears a particularly heavy burden in justifying this severe infringement on core First Amendment activity.

The government has not come close to meeting that burden. As a threshold matter, the government

has failed to establish that these limits further any important interest at all. Congress already has determined the threshold amount below which a contribution to a candidate, party committee, or PAC does not raise a cognizable corruption concern. Whether a person contributes that permissible amount to one candidate or 20 candidates makes no constitutional difference, as the risk of corruption or the appearance of corruption remains the same as to each candidate: non-cognizable. Accordingly, the only conceivable justification for aggregate limits is as a method of preventing circumvention of base contribution limits.

When this Court upheld FECA's ceiling on total contributions in *Buckley*, the government could make that anti-circumvention argument, as Congress had not limited the amount an individual could contribute to a political party committee or PAC at that time. In that context, FECA's ceiling served the anti-circumvention purpose of preventing individuals from funneling massive donations to candidates through political party committees and PACs, which otherwise would have been legal under FECA. Under current campaign finance law, that is simply no longer a realistic or legitimate concern. Current law not only imposes base limits on contributions to candidates, political party committees, and PACs, but contains numerous other, much more direct anti-corruption and anti-circumvention measures. Because the circumvention route this Court identified in *Buckley* is no longer legal, it is no longer something aggregate limits are needed to address.

Recognizing as much, the government has attempted to hypothesize new avenues of circumvention that aggregate limits theoretically might help foreclose. But even the district court was forced to concede that its proposed hypothetical was unlikely to occur, and the government has presented no evidence of such transactions ever happening. The circumvention problem the aggregate limits purport to target therefore remains a hypothetical one and nothing more. Even if the government's hypothetical scenarios were at all likely to occur, any cognizable risk of *quid pro quo* corruption would be alleviated by the absence of prearrangement or coordination between the initial contributor and the candidate who ultimately received the contributed funds. Accordingly, BCRA's aggregate limits in fact serve no purpose other than to "equalize" the relative ability of individuals to participate in the political process. That kind of equalization interest has no place in this context; the government may not seek to prevent people from exercising their First Amendment rights robustly.

In any event, even if some small sliver of the contributions that aggregate limits prohibit posed a circumvention or corruption problem, those limits would not be a closely drawn means of addressing it. Congress cannot effectively limit the number of candidates or political committees with which a person may associate based on a mere hunch that a few clever contributors might violate BCRA's earmarking provision and attempt to have a party committee or PAC funnel their contributions to a particular recipient. If Congress is truly concerned about joint fundraising committees or transfers of

funds between candidates, political party committees, or PACs, then it should devise a solution closely drawn to target that specific problem.

In short, BCRA's aggregate limits do not further any legitimate anti-corruption or anti-circumvention interest. Even if they did, they would be a drastically disproportionate response to any conceivable problem they might be designed to address. Accordingly, BCRA's aggregate limits impermissibly burden core First Amendment rights and are unconstitutional.

ARGUMENT

I. AGGREGATE CONTRIBUTION LIMITS SUBSTANTIALLY BURDEN FIRST AMENDMENT RIGHTS AND ARE SUBJECT TO RIGOROUS REVIEW.

Aggregate contribution limits burden core First Amendment rights and can survive only if they satisfy a rigorous form of constitutional scrutiny. While all contribution limits infringe First Amendment rights and are subject to exacting constitutional scrutiny, aggregate limits impose an especially pernicious constitutional burden, and therefore are that much harder for the government to justify. Unlike base contribution limits, which limit *the extent* to which an individual may associate herself with a single candidate or political party committee, aggregate contribution limits preclude a person from associating with, expressing support for, or attempting to assist *too many* candidates, parties, or political committees.

By preventing a person from making "too many" otherwise legal and innocuous contributions, aggregate limits effectively penalize those who wish

to exercise their First Amendment rights robustly. And this burden cannot easily be overcome, as there is an obvious practical limit to how many different candidates, parties, or political committees one person can support through on-the-ground efforts. Accordingly, the government bears a particularly heavy burden in justifying this severe imposition on constitutionally protected rights.

A. Contribution Limits Substantially Burden Fundamental First Amendment Rights.

1. Contribution limits substantially infringe the First Amendment rights of contributors, candidates, and political parties. "[T]he right of association is a basic constitutional freedom that is closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *FEC v. Nat'l Right to Work Comm.* ("*Right to Work*"), 459 U.S. 197, 206-07 (1982) (quotation marks and citations omitted). In a democratic society, the ability to associate with others in the political process is at the core of this fundamental right, "'enhanc[ing]'" the "'effective advocacy of both public and private points of view.'" *Buckley*, 424 U.S. at 15 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).

This right to "join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley*, 424 U.S. at 65-66 (quoting *NAACP*, 357 U.S. at 460). "'Making a contribution, like joining a political party, serves to affiliate a person with a candidate'" in an especially

"'important'" manner, and "'enables like-minded persons to pool their resources in furtherance of common political goals.'" *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 256 (1977) (Powell, J., concurring) (quoting *Buckley*, 424 U.S. at 22).

Contribution limits "impose direct quantity restrictions on political communications and association[.] ... Rather than potentially deterring or diminish[ing] the effectiveness of expressive activity, these limits stop it cold." *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2838-39 (2011) (Kagan, J., dissenting) (internal quotation marks omitted); *see also Buckley*, 424 U.S. at 14, 23 (holding that limits on contributions to candidates or political party committees "operate in an area of the most fundamental First Amendment activities" and "implicate fundamental First Amendment interests"). Thus, limits on contributions to candidates or parties entail "significant interference" with associational rights. *Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 387-88 (2000).

2. Contribution limits also infringe the First Amendment right to freedom of expression. Because a contribution "serves as a general expression of support for the candidate and his views," contribution limits restrict a person's "ability to engage in free communication." *Buckley*, 424 U.S. at 20-21; *see also id.* at 21 (noting that the size of a contribution provides a "very rough index of the intensity of the contributor's support for the candidate").

Indeed, many post-*Buckley* cases have recognized that the expressive component of political

contributions is even greater than that. The "right of association [and] the right of expression" often "overlap and blend" in the context of contribution limits. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290, 300 (1981). People who contribute to a candidate or PAC "obviously like the message they are hearing ... and want to add their voices to that message; otherwise they would not part with their money." *FEC v. Nat'l Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480, 495 (1985); *see also Colo. Republican Fed. Campaign Comm. v. FEC* ("*Colorado I*"), 518 U.S. 604, 636 (1996) (Thomas, J., concurring) ("When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself."). For all of these reasons, this Court has long recognized that political contributions are "entitled to full First Amendment protection." *NCPAC*, 470 U.S. at 495.

3. In addition, contribution limits can "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (plurality op.). As the government itself has pointed out, such limits can have "deleterious effects" on the political process and provide a "substantial advantage for wealthy candidates," by "mak[ing] it harder for candidates who are not wealthy to raise funds." *Davis v. FEC*, 554 U.S. 724, 743 (2008) (citing Br. for Appellee FEC at 33).

B. Aggregate Contribution Limits Infringe First Amendment Rights in Especially Pernicious Ways.

1. BCRA's aggregate limits on contributions to candidates and political committees impose especially pernicious burdens on First Amendment rights. Unlike a base contribution limit, which limits how much a person may give to any one candidate or political committee, an aggregate contribution limit "impose[s] an ultimate restriction upon *the number* of candidates and committees with which an individual may associate himself by means of financial support." *Buckley*, 424 U.S. at 38 (emphasis added).

In other words, although couched as limitations on *how much* someone may contribute, these provisions actually operate to prevent a person from associating with, demonstrating support for, and assisting "too many" candidates or parties in an election cycle. Particularly if an individual wishes to contribute the full legal amount of $5,200 ($2,600 for the primary and general elections) to the candidates she supports, the aggregate candidate contribution limit of $48,600 prohibits her from exercising that right as to more than a handful of candidates. The limit thus constrains "associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986).

Unlike a burden on *how much* someone may contribute to the candidates or committees she supports, a burden on *how many* candidates or

committees a person may contribute to cannot meaningfully be overcome through alternative avenues of exercising First Amendment rights. *Cf. Buckley*, 424 U.S. at 22 (noting that base contribution limits "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates"). Although an individual may be able to volunteer on behalf of a few local campaigns and place bumper stickers from several candidates on her vehicle, campaign contributions are the only realistic way to meaningfully and publicly demonstrate support for, associate with, and assist a variety of candidates and state parties, particularly when they are spread across the country.[14]

Alternatively, a person may reduce the size of her contribution to various candidates to whom she would otherwise contribute the legal maximum under the base limits, but that means diminishing the extent of her association with, expression of support for, and assistance to them. Accordingly, to the extent aggregate contribution limits leave open other avenues for exercising First Amendment rights, those avenues are much "more burdensome than the one it forecloses," *FEC v. Mass. Citizens for Life, Inc.*,

---

[14] Even if a person practically were able to travel throughout the nation to personally associate with and volunteer on behalf of numerous candidates, BCRA limits her ability to do so. Under BCRA, a person may spend only $1,000 for unreimbursed travel expenses on behalf of a candidate (and $2,000 on behalf of "all political committees of a political party"). 2 U.S.C. § 431(8)(B)(iv). Any unreimbursed funds over that amount count as contributions to that candidate or party, which are subject to BCRA's base contribution limits. *Id.* § 441a(a)(1).

479 U.S. 238, 255 (1986) (plurality op.), which makes aggregate limits a far more substantial infringement on First Amendment rights than base contribution limits.

2. Indeed, BCRA's aggregate contribution limits are far more burdensome than the laws this Court invalidated in *Davis* and *Bennett*, which likewise imposed special burdens and penalties on individuals who chose to exercise their First Amendment rights robustly. *Davis* involved BCRA's so-called "Millionaire's Amendment," 2 U.S.C. § 441a-1(a), a provision that was triggered when a congressional candidate spent at least $350,000 of his own funds on the race and those personal expenditures substantially exceeded the campaign contributions he received from others. *Davis*, 554 U.S. at 736. Once triggered, the amendment raised the limits on contributions to *other* candidates in the race, allowed those other candidates to accept contributions from individuals who had reached the aggregate candidate contribution limit, and permitted political party committees to make unlimited coordinated expenditures on their behalf. 2 U.S.C. § 441a-1(a). The Court concluded that the Millionaire's Amendment imposed a "special and potentially significant burden" and "an unprecedented penalty" on a candidate who "robustly exercises [her] First Amendment right" to spend personal funds in support of her candidacy. *Davis*, 554 U.S. at 738-39. As the Court explained, Congress may not "require[] a candidate to choose between the First Amendment right to engage in unfettered political speech" and avoiding "discriminatory fundraising limitations." *Id.* at 739.

Similarly, in *Bennett*, this Court struck down a state law under which, "[o]nce a privately financed candidate has raised or spent more than [$21,479], each personal dollar spent by the privately financed candidate result[ed] in an award of almost one additional dollar to his opponent[s]." 131 S. Ct. at 2818. The *Bennett* Court held that, like the law in *Davis*, this scheme imposed "'a special and potentially significant burden' [on a privately funded candidate] when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy." *Id.*

The Court further emphasized the especially severe burdens that the law imposed on the First Amendment rights of third parties who wished to make independent expenditures in support of the privately financed candidate. As the Court explained, "[o]nce the spending cap is reached, an independent expenditure group that wants to support a particular candidate ... can only avoid triggering matching funds" for that candidate's opponents by either "opt[ing] to change its message from one addressing the merits of the candidates to one addressing the merits of an issue, or refrain[ing] from speaking altogether." *Id.* at 2819-20. The Court concluded that "[p]resenting independent expenditure groups with such a choice makes the matching funds provision particularly burdensome" to those third parties. *Id.* at 2820.

Aggregate contribution limits burden First Amendment rights in much the same way that the Court found impermissible in *Davis* and *Bennett*. They prohibit a person from exercising her

constitutional right to make contributions to an ideologically aligned candidate, political party committee, or PAC simply because she already has made "too many" other constitutionally protected contributions to entirely distinct candidates, political party committees, or PACs. Such a blanket prohibition on supporting candidates and political committees of choice is a "special" and "significant burden" on First Amendment rights. *Davis*, 554 U.S. at 739; *accord Bennett*, 131 S. Ct. at 2819-20.

Just as in *Davis* and *Bennett*, this significant burden is triggered by a person's decision to "robustly exercise [her] First Amendment right[s]," by associating herself with, and demonstrating her support for, too many different candidates, party committees, and PACs. *Davis*, 554 U.S. at 739; *accord Bennett*, 131 S. Ct. at 2818. Aggregate limits thus force people to choose between engaging in constitutionally protected association and expression up to the legal base limit with certain candidates and parties, and retaining the right to associate with, and express support for, other candidates and parties. *Cf. Davis*, 554 U.S. at 740 (the government may not force a person to choose between "abid[ing] by a limit" on constitutionally protected activities and "endur[ing] a burden" on his First Amendment rights); *Bennett*, 131 S. Ct. at 2820 (a law may not "forc[e] [a] choice" on people regarding their First Amendment rights).

3. Aggregate contribution limits also interfere with fundamental First Amendment rights in a subtler, more perfidious way—by splintering political parties and creating a conflict of interest among each party's various candidates, state political committees,

and national political committees. *Cf. Storer v. Brown*, 415 U.S. 724, 736 (1974) ("[S]plintered parties and unrestrained factionalism may do significant damage to the fabric of government."); *accord Tashjian*, 479 U.S. at 223. Aggregate contribution limits pit a party's various federal candidates, as well as its state and national party committees, against each other for the limited dollars that a person is legally permitted to contribute during that election cycle.

To take the simplest example, in the current election cycle, a contributor such as McCutcheon may wish to contribute the legal maximum of $32,400 to each of the Republican Party's three national political committees (*i.e.*, the RNC, which focuses primarily on presidential elections and party building; the NRSC, which focuses on Senate races; and the NRCC, which focuses on House races). *See* Compl. ¶ 38. The $74,600 aggregate political committee contribution limit, however, gives each national party committee a substantial incentive to dissuade such a potential contributor from giving the maximum $32,400 to each of the others, because he then would be legally prohibited from contributing any more than approximately $10,000 to the remaining committee.

A similar conflict of interest exists between the three national party committees and the various state party committees because every dollar that a person contributes to a state committee's federal account (up to the $48,600 sub-limit) is one less dollar she may contribute to a national party

committee.[15] This conflict exists among the various state party committees as well; generous contributions to a handful of Democratic or Republican state parties will quickly reach the $48,600 sub-limit, making it impossible for that contributor to associate with, demonstrate her support for, and realistically assist other state parties.

As the complaint demonstrates, this problem further extends to individual candidates. During the last election cycle, McCutcheon's support of certain candidates made it illegal for him to contribute to the campaigns of others in a way that was especially meaningful to him (*i.e.*, contributing exactly $1,776 to each candidate). *See* Compl. ¶¶ 27, 28. This puts a party's congressional nominees in the uncomfortable position of competing against each other—rather than their true opponents from the other party—for a share of the limited funds each contributor is legally permitted to give.

This artificial and unnecessary internecine competition that aggregate limits inherently generate is likely to "color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 n.21 (1989). It forces candidates and party

---

[15] *See generally* Br. of *Amici Curiae* the National Republican Senatorial Committee and National Republican Congressional Committee (discussing the different functions served by the national party committees and the additional constraints that aggregate limits place on a donor's ability to support the national party committees).

committees to turn from the "major struggle[]" of ideas with their opponents to "intraparty feuds" over contributor funds subject to aggregate limits, *Storer*, 415 U.S. at 735, and interferes with the ability of political parties, their candidates, and members to associate together "for the advancement of common political goals and ideas," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997).[16]

C. The Government Bears a Particularly Heavy Burden in Justifying this Substantial Restriction on Core First Amendment Rights.

Precisely because aggregate contribution limits infringe so substantially on First Amendment rights, the government bears a particularly heavy burden in attempting to justify them. "[W]hen the First Amendment is involved, [this Court's] standard of review is 'rigorous.'" *NCPAC*, 470 U.S. at 501 (quoting *Buckley*, 424 U.S. at 29). Several Justices of this Court have explained that, because the burden that contribution limits impose on First Amendment activity is not meaningfully distinct from the burden that expenditure limits impose, contribution limits

---

[16] Compelling individuals to pick and choose among various state parties and congressional candidates when making contribution decisions also raises serious federalism concerns. Contributing to a candidate in one state limits a donor's ability to contribute equally to a candidate in an entirely unrelated election in a different state. The Constitution suggests that congressional races in each state are independent of each other, U.S. Const. art. I, § 2, cl. 1, 4, which calls into question the legitimacy of allowing a person's support for candidates in one state to impact the extent to which he may support candidates in others.

should not survive unless they satisfy the strictest scrutiny. *See, e.g., Randall*, 548 U.S.at 265 (Kennedy, J., concurring); *id.* at 265-67 (Thomas, J., concurring); *Colorado I*, 518 U.S. at 638 (Thomas, J., concurring, joined by Rehnquist, C.J., and Scalia, J.) ("A contribution is simply an indirect expenditure; though contributions and expenditures may thus differ in form, they do not differ in substance."). Nonetheless, this Court's cases "have "subjected strictures on campaign-related speech that [the Court] ha[s] found less onerous to a lower level of scrutiny," *Bennett*, 131 S. Ct. at 2817, under which the government bears the burden of proving that the restriction is "closely drawn" to further a "sufficiently important interest" and "avoid unnecessary abridgement of" First Amendment rights. *Buckley*, 424 U.S. at 25; *accord Shrink Missouri*, 528 U.S. at 387-88. Even that standard remains an "exacting" one, *Citizens Against Rent Cont.*, 454 U.S. at 298, and entails the "closest scrutiny," *Right to Work*, 459 U.S. at 206-07.

To the extent the Court is inclined to reconsider whether such gradations in the government's burden are necessary or appropriate in the campaign finance context, McCutcheon agrees that contribution limits, like all other burdens on First Amendment rights, should be subject to strict scrutiny.[17] *See generally* Brief of *Amicus Curiae* Senator Mitch McConnell.

---

[17] Because no reliance interest would be meaningfully frustrated by subjecting contribution limits to strict scrutiny, *see Citizens United v. FEC*, 558 U.S. 310, 365 (2010), this Court should not feel bound to continue abiding by *Buckley*'s unsustainable dichotomy between contributions and

But whether this Court chooses to characterize its standard of review as "strict," "exacting," "close," or "rigorous," the key point in this case is that aggregate contribution limits effectively impose a "substantial burden" and "penalty" on an individual who wishes to "robustly exercise[] [her] First Amendment right[s]" by supporting too many candidates or political committees. *Davis*, 554 U.S. at 738-40. That penalty is distinct from and far more pernicious than the burden that base contribution limits impose, and the government therefore cannot justify that penalty simply by pointing to the same arguments this Court has found sufficient to support base contribution limits.

In other words, the government cannot meet its heavy burden by insisting that contribution limits *in general* serve important anti-corruption interests; rather the government must demonstrate that it has an important, constitutionally valid interest in limiting the total amount of money that a person contributes to all candidates, political party committees, or PACs in an election. If the government fails to prove that Congress sufficiently tailored BCRA's aggregate contribution limits to serve such an important and legitimate interest, then those limits are unconstitutional. *See, e.g.*, *Randall*, 548 U.S. at 247-48 (invalidating Vermont's limits on contributions to candidates because they "work[ed]

---

expenditures. Moreover, *stare decisis* is at its nadir with constitutional rulings because the political branches cannot overrule them. *See Wisconsin Right to Life, Inc.*, 551 U.S. at 500 (Scalia, J., concurring) ("This Court has not hesitated to overrule decisions offensive to the First Amendment").

more harm to protected First Amendment interests than their anticorruption objectives could justify"); *Citizens Against Rent Cont.*, 454 U.S. at 300 (invaliding limits on contributions to committees that supported or opposed ballot measures).

II. BCRA'S AGGREGATE CONTRIBUTION LIMITS DO NOT FURTHER ANY CONSTITUTIONALLY PERMISSIBLE GOVERNMENT INTEREST.

BCRA's aggregate contribution limits are unconstitutional because they do not further a sufficiently important government interest. The only interests that this Court has recognized as sufficiently important to burden First Amendment rights in the campaign finance context are avoiding corruption and the appearance of corruption. By its very nature, a contribution to a candidate, political party committee, or PAC that is within the legal base limit—that is, a contribution below the threshold at which Congress determined that a cognizable risk of corruption arises—does not raise the specter of corruption. The fact that an individual might choose to make many such innocuous contributions does not render any of them any more troubling or likely to corrupt its recipient. So long as Congress imposes base limits on *how much* an individual may contribute to each candidate, political party committee, or PAC, it has no distinct interest in limiting *how many* candidates, parties, or PACs a person contributes to within those base limits.

If aggregate limits are to be justified, then, the government must demonstrate that they are a sufficiently tailored means of preventing

circumvention of anti-corruption measures. The *Buckley* Court upheld FECA's aggregate contribution ceiling based on such a rationale, but only because FECA did not limit the amount an individual could contribute to a political party committee or PAC. FECA's aggregate contribution ceiling, in essence, served as a substitute for those missing base limits. The current campaign-finance scheme, in contrast, contains not only an intricate, multi-layered web of base contribution limits, but numerous other provisions that eliminate entirely the circumvention problem *Buckley* identified.

Recognizing that it can no longer rely on *Buckley*'s rationale, the government hypothesizes new and far-fetched circumvention scenarios that even the district court conceded were unlikely. The government has failed to introduce any evidence, or otherwise establish, that those hypothetical problems exist, or that BCRA's aggregate limits actually target them. Accordingly, the government has failed to prove that BCRA's aggregate limits serve any interest sufficiently important to justify the onerous burden they impose on First Amendment rights; indeed, its effort to satisfy its demanding burden never even gets off the ground.

A. Aggregate Contribution Limits Do Not Directly Prevent Corruption or the Appearance of Corruption.

1. This Court has identified only two closely related interests that are sufficiently important to abridge the First Amendment rights of individuals, candidates, and political parties through contribution limits: avoiding corruption and the appearance of

corruption. *Citizens United*, 558 U.S. at 359; *Davis*, 554 U.S. at 741; *NCPAC*, 470 U.S. at 496-97 ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."); *Buckley*, 424 U.S. at 26-28.

Because public officials in a democracy must be responsive to the preferences and demands of the electorate, including their supporters, *see McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and dissenting in part) ("Democracy is premised on responsiveness."), this Court has construed the government's interest in preventing corruption quite narrowly. Despite broad language in some earlier opinions, *see, e.g.*, *Shrink Missouri*, 528 U.S. at 388-89; *FEC v. Colorado Republican Federal Election Comm.* ("*Colorado II*"), 533 U.S. 431, 440-41 (2001), the Court has clarified that the government's interest in preventing the actuality and appearance of corruption is "limited to *quid pro quo* corruption." *Citizens United*, 558 U.S. at 359; *see also NCPAC*, 470 U.S. at 497 (the government may limit contributions and their equivalents only to prevent "financial *quid pro quo*: dollars for political favors"); *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 478-79 (2006) (plurality op.); *Buckley*, 424 U.S. at 26-28. The fact that contributors "may have influence over or access to elected officials does not mean that those officials are corrupt." *Citizens United*, 558 U.S. at 359; *see also McConnell*, 540 U.S. at 297 (Kennedy, J.) ("It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those

policies."). Similarly, the government may not impede First Amendment activities simply because a candidate might be grateful for them. *Citizens United*, 558 U.S. at 360 ("Ingratiation and access ... are not corruption.").

2. Congress does not have a distinct interest in limiting the number of candidates, political party committees, or PACs to which an individual may contribute. This Court has made clear that, if a particular type of contribution or expenditure does not create a risk of *quid pro quo* corruption, then Congress has no interest in limiting how often a person engages in it. *NCPAC*, 470 U.S. at 497 (invalidating limit on independent expenditures by political party committees because there is "no tendency in such expenditures ... to corrupt or give the appearance of corruption"); *Citizens Against Rent Cont.*, 454 U.S. at 297-98 (invalidating limit on amount an individual could contribute to a committee supporting or opposing a ballot measure because such contributions did not create a risk of corruption).

Under current law, Congress has determined that contributions of $2,600 or less per election to a candidate do not create a cognizable risk of corruption. 2 U.S.C. § 441a(a)(1)(A); *see Davis*, 554 U.S. at 742-43 (treating a contribution limit as embodying "Congress' judgment" that contributions up to that amount "do not unduly imperil anticorruption interests"). Regardless of whether a contributor makes individually permissible and legally innocuous contributions to one candidate, 10 candidates, or 100 candidates, the likelihood that any

such contribution involves *quid pro quo* corruption, or its appearance, remains unchanged: so low that Congress saw no need to address it. Thus, the government has no distinct anti-corruption interest in limiting the frequency or extent to which an individual may make individually innocuous contributions to different candidates. *See, e.g.*, *Colorado I*, 518 U.S. at 617 (invalidating limit on independent expenditures by political parties because such expenditures did not create a "risk of corruption"); *Davis*, 554 U.S. at 741 (holding that, since BCRA's Millionaire's Amendment allowed non-self-financed candidates to accept contributions up to $6,900, government could not argue that allowing self-financed candidates to accept contributions in that amount "serv[ed] anticorruption goals").

The same is true with regard to political party committees and PACs. Congress already has established base limits which prohibit contributions of an amount that may implicate the appearance or actuality or corruption. 2 U.S.C. § 441a(a)(1)(C)-(D). The fact that an individual makes contributions below that amount to multiple party committees or PACs does not render any one of those contributions any more likely to be (or appear) corrupt. Therefore, aggregate contribution limits do not directly prevent the actuality or appearance of corruption.

3. Nor may the government defend aggregate contribution limits on egalitarian grounds. Congress' interest in preventing corruption and its appearance does not allow it to "restrict the speech of some elements of our society in order to enhance the relative voice of others." *Bennett*, 131 S. Ct. at 2821;

see also Citizens United, 558 U.S. at 355 ("[P]olitical speech cannot be limited based on a speaker's wealth."); *Mass. Citizens for Life*, 479 U.S. at 257 ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."). This Court has flatly rejected the notion that Congress may seek to protect some "contributors ... from the possibility that others will make larger contributions." *Citizens Against Rent Cont.*, 454 U.S. at 295; *see also Davis*, 554 U.S. at 740 n.7 ("[L]eveling electoral opportunities ... cannot justify the infringement of First Amendment interests.").[18] Thus, aggregate contribution limits may not be upheld as a means of limiting disparities in the extent to which people of different economic backgrounds are able to participate in the political process and exercise their First Amendment rights.

B. BCRA's Aggregate Contribution Limits Do Not Prevent Circumvention of Anti-Corruption Measures.

BCRA's aggregate contribution limits fare no better as an indirect, prophylactic means of combating corruption by preventing contributors from circumventing base limits on contributions to

---

[18] In *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 659-60 (1990), this Court held that a state could prohibit corporations from making independent expenditures with their own funds in order to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Citizens United* expressly repudiated that holding, recognizing "*Austin*'s antidistortion rationale" as an "aberration." 558 U.S. at 350.

candidates. The *Buckley* Court approved FECA's aggregate contribution ceiling because it prohibited otherwise legal methods through which contributors easily could evade FECA's base candidate contribution limits. That reasoning cannot sustain BCRA's aggregate limits, however, because numerous other provisions of current campaign finance law already prohibit the various ways in which a contributor might attempt to circumvent base limits.

1. In the Years Since *Buckley*, Congress Has Eliminated the Need for Aggregate Contribution Limits as Anti-Circumvention Measures.

This Court has considered an aggregate contribution limit exactly once—in a single paragraph of *Buckley* that noted that the issue "ha[d] not been separately addressed at length by the parties." *Buckley*, 424 U.S. at 38. The Court recognized that FECA's aggregate contribution ceiling "impose[d] an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." *Id.* It nevertheless upheld the ceiling as "no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." *Id.* The Court explained that FECA's ceiling served a clear anti-circumvention purpose: "prevent[ing] evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to

contribute to that candidate, or huge contributions to the candidate's political party." *Id.* Absent FECA's ceiling, such transactions would have been legally permissible because FECA did not otherwise impose any direct limit on how much a person could contribute to a political party committee or PAC.

FECA's aggregate ceiling therefore acted, in effect, as a surrogate base limit on contributions to PACs and political party committees. *Buckley* upheld the ceiling only as a mechanism for preventing a person from giving *unlimited* contributions to an unlimited number of political party committees or PACs, thereby potentially allowing her to circumvent limits on how much she could contribute to each candidate. Congress has since eliminated the problem identified in *Buckley* and, with it, any plausible justification for aggregate limits as an anti-circumvention measure.

Unlike pre-*Buckley* FECA, BCRA expressly limits the amount of money an individual may contribute not only to each candidate, but to each local, state, and national political party committee and PAC. 2 U.S.C. § 441a(a)(1). Accordingly, an individual may not make the kind of "massive," "huge," *unlimited* contributions to political party committees or PACs that *Buckley* contemplated. *Buckley*, 424 U.S. at 38. Aggregate limits can no longer be considered an indirect limit on contributions to political party committees and PACs because *direct* limits on contributions to such entities now exist.

These new restrictions on contributions *to* political party committees and PACs are bolstered by

additional limits on contributions *by* political party committees and PACs. In addition to retaining FECA's base limit of $5,000 for contributions from a national, state, or local party or multicandidate PAC to a candidate,[19] BCRA prohibits those entities from contributing more than $5,000 annually to any other PAC. 2 U.S.C. § 441a(a)(2)(A), (C). A multicandidate PAC is also prohibited from contributing more than $5,000 to a state or local party committee, or $15,000 to a national political party committee. *Id.* § 441a(a)(2)(B), (C). These provisions further prevent individuals from using PACs or political party committees to funnel large amounts of money to candidates.

Congress also specifically has addressed the problem of using multiple PACs to circumvent base contribution limits. All contributions to political committees that are established, financed, maintained, or controlled by the same corporation, union, or other person—including an entity's parents, subsidiaries, branches, divisions, departments, or local units—are now "considered to have been made by a single political committee." *Id.* § 441a(a)(5). A person therefore cannot evade base contribution limits by providing money to a series of affiliated PACs that will, in turn, contribute to a particular candidate.

Likewise, a contributor may not evade base limits by channeling contributions through a PAC or political party committee to a specific candidate. All

---

[19] *See also supra* notes 6, 8 (identifying other restrictions on candidate contributions and coordinated expenditures by state and national political party committees).

contributions that a person makes "either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate," are "treated as contributions from such person to such candidate." *Id.* § 441a(a)(8). The intermediary is required to report to the FEC the contributor and the intended recipient of the contribution. *Id.*[20] These provisions collectively eliminate the circumvention problem identified in *Buckley*.

The *Buckley* Court did not approve FECA's aggregate contribution ceiling as a mechanism for preventing a person from giving too many small contributions to too many different candidates. Nor did it uphold the ceiling as a secondary measure to further regulate already illegal avenues of circumventing contribution limits, or to reinforce other existing prohibitions. Rather, this Court upheld FECA's ceiling as a second-best surrogate for base limits on contributions to political party committees and PACs, which FECA lacked. Accordingly, BCRA's aggregate limits cannot plausibly be said to serve the same anti-circumvention rationale as FECA's aggregate contribution ceiling—let alone do so in a manner "closely drawn" to "avoid unnecessary abridgement of" First Amendment rights. *Buckley*, 424 U.S. at 25.

---

[20] In addition, federal law prohibits contributors from making contributions in the name of another person or with the funds of another person. 2 U.S.C. § 441f.

2. The Government's Efforts to Portray BCRA's Aggregate Limits as Anti-Circumvention Measures Rest on Pure Speculation with No Factual Support.

Because BCRA's aggregate contribution limits cannot be sustained under the same rationale as FECA's contribution ceiling, the government bore the burden of providing an independent and factually supported theory as to how these limits operate as a closely drawn means of preventing circumvention of base contribution limits, without unnecessarily abridging First Amendment rights. The government has not come close to satisfying that burden.

The government contended, and the district court agreed, that aggregate contribution limits are constitutional because they might serve a *hypothetical* anti-circumvention purpose. According to the district court, it is at least conceivable that a joint fundraising committee could be formed "comprising a party's presidential candidate, the party's national party committee, and most of the party's state committees." JS.App.12a. And it is conceivable, in this hypothetical scenario, that a person "might" give a half-a-million-dollar check to this hypothetical joint fundraising committee, that the various committees comprising this joint committee "might" decide to transfer all the funds to a single committee, that this committee in turn "might" use the money for coordinated expenditures with a candidate, and that this candidate might, in turn, feel "[g]ratitude" toward the original contributor as a result. JS.App.12a.

If that daisy chain of events sounds far-fetched, that is because it is. Neither the government nor the district court cited a single shred of evidence to support it. To the contrary, the district court readily conceded that these events were "unlikely" to occur, yet nonetheless upheld the aggregate limits because the court could "imagine" such an implausible scenario. JS.App.12a. The court did not even address the likelihood that many steps in its analysis are illegal under current law. *See* 2 U.S.C. § 441a(a)(2)(A), (d)(1)-(3) (imposing limits on contributions and coordinated expenditures by political committees to candidates); *id.* § 441a(a)(8) (imposing restrictions on earmarking); *id.* § 441f (prohibiting contributions with the funds of another).

This Court has "never accepted mere conjecture as adequate to carry a First Amendment burden," *Shrink Missouri*, 528 U.S. at 391, and it should not start doing so now. *Cf. Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means to ... prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.") (internal citation and quotation marks omitted). To carry its burden, the government must provide actual evidence that the First Amendment activity it seeks to prohibit tends to cause *quid pro quo* corruption or the appearance of such corruption, and that the restrictions at issue will help prevent it. Critically, a burden on First Amendment rights cannot rest on "a hypothetical possibility and nothing more." *NCPAC*, 470 U.S. at 498 (invalidating limit on independent expenditures by PACs where government failed to introduce any

evidence suggesting that "an exchange of political favors for uncoordinated expenditures" was likely to occur).

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391. The Court has excused the government from presenting actual evidence to meet this burden only where it "has been long recognized," and "there is little reason to doubt," that the targeted act involves "the evil of potential corruption." *NCPAC*, 470 U.S. at 500; *Shrink Missouri*, 528 U.S. at 395.

There is nothing remotely obvious about how contributing to multiple candidates running in entirely separate elections, or to multiple state political parties (or PACs) across the country, is likely to lead to *quid pro quo* corruption or even the appearance of such corruption when base contribution limits for all of those entities already exist. Indeed, the much more obvious inference is that Congress' carefully calibrated base contribution limits eliminate any cognizable corruption risk. Speculation and guess work cannot suffice in this context. If the government wishes to demonstrate that layering aggregate limits on top of base limits is a closely drawn means of preventing circumvention of those base limits, it must provide some concrete evidence to support that unlikely contention and cannot rest—as the district court did—upon a mere "hypothetical possibility." *NCPAC*, 470 U.S. at 498.

The government's failure to meet its demanding burden is confirmed by other cases in which this Court has rejected sheer speculation as a sufficient basis for limiting core First Amendment rights. For instance, in *First National Bank of Boston v. Bellotti*, the Court refused to allow a state to restrict corporate political speech based on nothing more than "the *assumption* that such participation would exert undue influence" over the electorate. 435 U.S. 765, 789 (1978) (emphasis added). And in *Citizens Against Rent Control*, the Court struck down a contribution limit on the amount a person could give to committees supporting or opposing ballot measures where "the record ... [did] not support the [lower court's] conclusion that [the limit was] needed to preserve voters' confidence in the ballot measure process." 454 U.S. at 299; *see also id.* at 302 (Marshall, J., concurring) ("I find no such evidentiary support in this record."); *id.* at 303 (Blackmun, J., and O'Connor, J., concurring) ("The city's evidentiary support in this case is equally sparse.").

Likewise, in *Colorado II*, the Court subjected FECA's limit on coordinated expenditures by political party committees to "the scrutiny appropriate for a contribution limit," because FECA treated them as the legal equivalent of campaign contributions. 533 U.S. at 46. Applying exacting scrutiny, the Court scoured the evidentiary record to determine whether "adequate evidentiary grounds exist[ed] to sustain the limit" and reviewed whether the government adequately had proven that there existed "a serious threat of abuse from unlimited coordinated party spending as the Government contend[ed]." *Id.* at 457; *see also Citizens United*, 558 U.S. at 360

(emphasizing the "scant evidence that independent expenditures" by corporations "even ingratiate" the entities making them to the candidates they are intended to assist). As these decisions underscore, when the government seeks to burden core First Amendment rights, it must start by demonstrating that the problem it purports to target *actually exists*. The government simply did not do that in this case.

3. The Aggregate Contribution Limits Do Not Prevent Any Cognizable Risk or Appearance of Corruption.

Even assuming the chain of events the government proposed and the district court accepted were more than a mere "hypothetical possibility," *NCPAC*, 470 U.S. at 98, such occurrences would not create a sufficiently cognizable risk of the appearance or actuality of corruption to justify burdening fundamental First Amendment rights.

1. The district court's hypothetical scenario does not create a constitutionally cognizable risk of actual or apparent corruption under this Court's precedents. According to the district court, a contributor might provide funds to a candidate or political party committee, which in turn might contribute those funds to another candidate to whom the original contributor already had given the legal maximum of $2,600. JS.App.12a. The court opined that this would allow that contributor to circumvent BCRA's base candidate contribution limit and obtain the "gratitude" of the ultimate recipient of the funds, raising the specter of some implicit, undefined *quid pro quo*. JS.App.12a.

This logic fails, however, because once the original candidate or political party committee receives a contributor's funds, that contributor loses all control over their disposition. Indeed, if the contributor did attempt to "earmark" the contribution for some particular recipient, then the "intermediary or conduit" would have to report it to the FEC as a direct contribution from the contributor to that ultimate recipient, 2 U.S.C. § 441a(a)(8), and the contributor would violate the base candidate contribution limit, *id.* § 441a(a)(1)(A). In the absence of such earmarking, however, a contributor has no control over whether a candidate, party, or PAC to whom she provides funds will contribute them to a particular candidate.

The absence of "prearrangement and coordination" between a contributor and a candidate "alleviates the danger" of actual and apparent corruption, and therefore eliminates any constitutionally legitimate basis for burdening First Amendment rights. *Buckley*, 424 U.S. at 47. This Court made that point in *NCPAC*, when it invalidated limits on the amount of independent expenditures that PACs could make in support of presidential candidates. Discussing the risk of corruption that such expenditures posed, the Court stated, "[i]t is of course hypothetically possible ... that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages." *NCPAC*, 470 U.S. at 498. But because "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate," the Court concluded that such

circumstances "alleviate[] the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.*; *see also Colorado I*, 518 U.S. at 617-18 ("[T]he constitutionally significant fact ... is the lack of coordination between the candidate and the source of the expenditure. This fact prevents us from assuming ... that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption.").

Likewise, one certainly can speculate—as the district court did—that if someone contributed money to a candidate, political party committee, or PAC, and that entity re-contributed the money to a different candidate, the ultimate recipient "might take notice of and reward" the original contributor. *NCPAC*, 470 U.S. at 98. But earmarking prohibitions prevent that kind of prearrangement and coordination concerning the disposition of the original contribution. 2 U.S.C. § 441a(a)(8). That lack of prearrangement and coordination "undermines the value ... to the candidate" of the original contribution and "alleviates the danger" that it "will be given as a quid pro quo for improper commitments from the candidate." *NCPAC*, 470 U.S. at 98; *see also Colorado I*, 518 U.S. at 617. Thus, as a matter of law, the types of otherwise legal transactions aggregate contribution limits might target do not entail a risk of actual or apparent corruption.

2. Furthermore, as a practical matter, it is highly unlikely that a candidate will receive a substantial contribution that can be traced back through another

candidate, political party committee, or PAC to a particular contributor. Many candidates, political party committees, and PACs receive donations from numerous sources. Even if an individual contributes the legal maximum to a candidate, political party committee, or PAC, that amount is likely to be only a small—potentially even miniscule—fraction of the recipient's overall assets. Consequently, if that recipient makes a contribution to another candidate, the *pro rata* share of the contribution that can be attributed to any particular contributor is likely to be negligible.

The RNC, for example, raised more than $386 million during the 2012 presidential election. *See supra* p. 13 & n.13. Even if a donor contributed the legal maximum to the RNC ($32,400), and the RNC in turn contributed the legal maximum to a candidate ($5,000), the *pro rata* share of that contribution for which the candidate could credit the original contributor would be less than one hundredth of one percent, amounting—quite literally—to pocket change. Thus, even under the government's and district court's reasoning, the aggregate limits do not prevent a cognizable risk of corruption.

3. More fundamentally, the government's basic theory of how aggregate limits prevent circumvention has no stopping point. The government's position implicitly assumes that contributing $5,200 over the course of an election cycle to each of nine candidates is not problematic, but giving the same amount to a tenth candidate (thereby putting the contributor over the aggregate limit) dramatically increases the risk

that those funds will find their way back to one of the first nine. There is no reason to assume, however, that the likelihood of the tenth candidate giving away his hard-earned contributions to one of the first nine candidates is any greater than the likelihood of the third candidate giving away his contributions to one of the first two. In other words, under the government's reasoning, the circumvention problem arises any time a person contributes to more than one candidate. Accordingly, if this Court adopts the government's theory, then there is no obvious reason why Congress could not require contributors to limit their contributions to, at most, a single candidate in any given election cycle.

It is difficult enough to ascertain the point at which a limit on *how much* someone may contribute to a single candidate crosses the line between permissibly targeting *quid pro quo* corruption and impermissibly burdening too much First Amendment activity. *Cf. Randall*, 548 U.S. at 248 (recognizing "the existence of some lower bound" on base contribution limits). But there is no meaningful way to determine the point at which an individual has contributed an otherwise permissible amount of money to *too many* candidates.

4. BCRA's structure itself underscores that the government's anti-circumvention rationale makes no sense. BCRA's base contribution limits allow an individual to contribute $2,600 per election to a particular candidate, and then contribute additional funds to a different candidate, a political party committee, or a PAC. 2 U.S.C. § 441a(a)(1). BCRA also permits that other candidate, party committee,

or PAC to re-contribute the additional funds to the first candidate (subject to earmarking provisions and other safeguards), even if the original contributor already had reached his base contribution limit for the first candidate. *Id.* § 441a(a)(2).

Rather than reflecting a devious method of circumventing base contribution limits, this is an intentional, essential part of the system BCRA established. Under BCRA, the fact that an individual has contributed the legal maximum to a particular candidate does not, and was not intended to, restrict him from contributing to other candidates, PACs, or political party committees that also may support or contribute to that candidate. The notion that the government has an important interest in preventing an individual from doing so is therefore misguided at best, and in tension with the structure of the law as a whole.

5. The government's claim that aggregate contribution limits are an important means of preventing circumvention of base contribution limits is further undermined by the fact that most states that limit contributions to candidates have not enacted such aggregate limits. *Cf. W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) ("The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it."). As of 2010, of the 38 jurisdictions (including Washington, D.C.) that limited contributions to candidates, only 11 imposed additional aggregate limits on the total amount of money that a person could contribute to all

candidates in an election cycle.[21] The fact that *over 70%* of states that limit contributions to candidates concluded that aggregate limits are unnecessary to prevent circumvention discredits the notion that the government has an important interest in imposing such a burden on First Amendment rights.

At bottom, BCRA's aggregate limits do not further any government interest that this Court has found legitimate. In truth, they are designed not to target corruption or prevent improper circumvention of base contribution limits—a feat they are ill-suited to achieving—but rather to limit the extent to which any particular individual may participate in the political process. That kind of equalization interest is a patently impermissible basis for burdening core First Amendment activity. *Bennett*, 131 S. Ct. at 2821; *Davis*, 554 U.S. at 740 n.10, 741; *Mass. Citizens*

---

[21] *See* Ariz. Rev. Stat. Ann. § 16-905(E) (2012);Conn. Gen. Stat. § 9-611(c) (2013); D.C. Code § 1-1163.33(b)(1); Me. Rev. Stat. Ann. tit. 21-A, § 1015(3) (2013); Md. Ann. Code § 13-226(b) (2013); Mass. Gen. Laws ch. 55, § 7A(a)(5) (2013); N.Y. Laws [Elec.] § 14-114 (2012); R.I. Gen. Laws § 17-25-10.1(a)(1) (2012); Wash. Rev. Code § 42.17A.420 (2012) (applicable only to contributions within 21 days of a general election); Wis. Stat. § 11.26(4) (2013); Wyo. Stat. Ann. § 22-25-102 (c)(ii) (2012).

The following states have enacted base contribution limits without aggregate contribution limits: Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Vermont, and West Virginia. *See generally* National Conference of State Legislatures, *State Limits on Contributions to Candidates* (Jan. 20, 2010), *available at* www.ncsl.org/print/legismgt/ limits_candidates.pdf.

for Life, 479 U.S. at 258. Accordingly, BCRA's aggregate limits are unconstitutional.

III. EVEN ASSUMING THAT AGGREGATE CONTRIBUTION LIMITS FURTHER A LEGITIMATE INTEREST, THEY ARE NOT SUFFICIENTLY TAILORED.

Even assuming that BCRA's aggregate contribution limits further the government's interest in preventing *quid pro quo* corruption or the appearance of such corruption, they still are unconstitutional because they are not a "closely drawn" means of doing so. *Buckley*, 424 U.S. at 25. As this Court repeatedly has admonished, the government may not combat corruption through imprecise and overbroad measures that "unnecessar[ily] abridg[e]" fundamental First Amendment rights. *Id.*

1. As explained above, *see supra* Part II.A, BCRA's aggregate contribution limits do not target corruption directly, but rather are, at best, anti-circumvention measures designed to reinforce the statute's other, direct anti-corruption measures. Because that kind of prophylactic restriction intrinsically sweeps in First Amendment conduct that does not BY itself give rise to *quid pro quo* corruption or an appearance of corruption, *see Wisconsin Right to Life*, 551 U.S. at 475 (plurality op.), it will survive constitutional scrutiny only if the government establishes that the measure is closely drawn to target the circumvention of anti-corruption laws, *Shrink Missouri*, 528 U.S. at 387-88; *Buckley*, 424 U.S. at 25.

The government cannot satisfy this burden when it demonstrates only an "attenuated" relationship between the corrupt conduct it constitutionally may prevent and the additional conduct it wishes to prohibit. *Colorado I*, 518 U.S. at 616. Nor may the government prohibit a broad range of constitutionally protected conduct to reach a narrow sliver of conduct that raises the specter of *quid pro quo* corruption. *See, e.g.*, *Citizens United*, 558 U.S. at 362 (holding that government may not bar all corporations from engaging in independent expenditures as a means of "preventing foreign individuals or associations from influencing our Nation's political process"); *NCPAC*, 470 U.S. at 498 (invaliding prohibition on independent expenditures by PACs because, "[e]ven were we to determine that the large pooling of financial resources [by PACs] did pose a potential for corruption or the appearance of corruption," the challenged statute was "not limited to multimillion dollar war chests," but rather "appl[ied] equally to informal discussion groups that solicit neighborhood contributions").

For example, in *Bennett*, the state attempted to defend the penalty that its laws imposed on privately financed candidates by arguing that it would prevent corruption by inducing candidates to accept public financing. 131 S. Ct. at 2827. The Court rejected that rationale as far too attenuated, holding, "the fact that burdening constitutionally protected speech might indirectly serve the State's anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision." *Id.*

2. Aggregate contribution limits prohibit far more protected First Amendment activity than the small sliver that conceivably might raise legitimate circumvention concerns. The vast majority of contributions to candidates or parties in excess of BCRA's aggregate contribution limits are likely to be retained by their recipients, rather than re-contributed, directly or indirectly, to another candidate. For example, during the 2012 election cycle, the RNC contributed only 0.07% of its funds to candidates, and dedicated only 5.8% to coordinated expenditures. *See supra* p. 13 & n.13. Those figures were even lower during the previous election cycle. *Id.* A contribution that complies with BCRA's base limits and is retained and ultimately used by its initial recipient—rather than transferred or re-contributed elsewhere—raises neither concerns about direct corruption nor a cognizable risk of circumvention of base contribution limits.

Moreover, because most candidates, parties, and PACs receive contributions from numerous sources, if one of those entities does make a contribution to another candidate, it is highly unlikely that any portion of that money could or would be ascribed to the original contributor. And even if the ultimate recipient were aware that certain contributors had contributed to the "intermediary" candidate or party, the *pro rata* portion of the funds for which each contributor could be deemed responsible is likely to be so small—potentially even miniscule—that there is no cognizable risk of *quid pro quo* corruption or the appearance thereof. Finally, even in the rare instance where a substantial amount of money could be traced back to a particular contributor, "few" such

contributions are likely to actually "involve [a] *quid pro quo* arrangement[]." *Citizens United*, 558 U.S. at 357.

BCRA's aggregate limits therefore impose a sweeping prohibition on innocuous, constitutionally protected conduct as a vastly overbroad means of deterring a tiny proportion of potentially improper transactions. *See id.* at 362; *NCPAC*, 470 U.S. at 498. Especially given BCRA's veritable laundry list of much more direct anti-corruption and anti-circumvention measures—including base limits on contributions from individuals to candidates, political party committees, and PACs; limits on contributions from political party committees, PACs, and candidates to other candidates; restrictions on the proliferation of multiple PACs by a single entity; strict earmarking rules; prohibition on contributions made in the name, or with the funds, of another; and exhaustive disclosure requirements (to say nothing of federal anti-bribery laws)—its aggregate contribution limits are not remotely closely tailored to achieve any important government interest. *Cf. Wisconsin Right to Life*, 551 U.S. at 479 (plurality opinion) ("a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny").

3. Aggregate limits also are aimed at the wrong activity. There is nothing suspicious or troubling about making a contribution to a candidate, political party, or PAC within BCRA's base contribution limits; indeed, BCRA expressly permits such contributions. *See* 2 U.S.C. § 441a(a)(1). Rather, the government's professed anti-circumvention concerns arise only from the possibility that candidates,

political party committees, or PACs will shuffle around that contribution and ultimately channel it to an "improper" recipient. Aggregate contribution limits are a poorly tailored solution to that problem because, rather than targeting the putatively improper conduct by the recipient candidates, political party committees, and PACs, they instead restrict *the contributor's* ability to make otherwise legal contributions.

Massachusetts Citizens for Life underscores the impropriety of using aggregate limits to address such a highly attenuated anti-circumvention concern. There, this Court struck down a law that prohibited non-profit corporations formed primarily for issue advocacy from making independent expenditures in federal elections. The government argued that this prohibition prevented such groups from engaging in "massive *undisclosed* political spending" and serving as "conduits for *undisclosed* spending by business corporations and unions." 479 U.S. at 261 (emphasis added). But the Court concluded that the provision was impermissibly overbroad, emphasizing that "[t]he state interest in disclosure ... can be met in a manner less restrictive," such as by requiring those entities to disclose their expenditures or the identities of anyone who contributed to them for the express purpose of influencing elections. *Id.* at 261-62; *see also Citizens Against Rent Cont.*, 454 U.S. at 299-300 (invaliding limit on individuals' contributions to political committees that supported or opposed ballot measures, because the municipality's interest in allowing voters to "identify[] the sources of support for and opposition to [those] measures ... will be adequately protected" by

less intrusive disclosure requirements and a prohibition on anonymous contributions).

Just as undisclosed spending can be much more directly addressed by disclosure requirements, potential perceived problems with financial transfers and contributions among candidates, political party committees, and PACs can be much more directly addressed by measures that target those transfers themselves and impose less of a burden on First Amendment rights. Most basically, Congress could address any concern relating to joint fundraising committees—which is the only concern the district court expressly identified as a basis for aggregate limits, JS.App.10a-11a—by more closely regulating *joint fundraising committees* themselves. Ameliorating perceived problems with joint fundraising committees by imposing a flat aggregate limit on contributions an individual may make to any candidates, political party committees, and PACs—regardless of whether they even participate in a joint fundraising committee—cannot plausibly be deemed a "closely tailored" solution to this hypothetical problem. *Cf. Citizens United*, 558 U.S. at 362 (ban on all independent expenditures by corporations was not a closely tailored means of preventing contributions by foreign corporations); *NCPAC*, 470 U.S. at 498 (prohibition on independent expenditures by all PACs, regardless of their wealth, was not a closely tailored means of addressing potential corruption that may arise from "multimillion dollar war chests").

If Congress is concerned more broadly about the possibility of political party committees acting as conduits to evade base contribution limits, there are

several obvious and much more narrowly tailored solutions it may consider. For example, the most direct remedy would be to limit financial transfers among political party committees, or amend 2 U.S.C. § 441a(a)(4) to treat such interparty transfers as contributions for some or all purposes, including base contribution limits. Alternatively, Congress could address anti-circumvention concerns without unnecessarily infringing on contributors' rights by replacing the aggregate limits with an aggregate contribution threshold for individuals, and requiring entities that receive funds contributed in excess of the contributor's aggregate threshold to deposit them into segregated, non-transferrable accounts.

In short, aggregate limits on contributions to all candidates, political party committees, and PACs are a blunderbuss and highly attenuated method of furthering any legitimate anti-circumvention goal the government might have. They have no place in a campaign finance system that is already chock-full of much more direct anti-corruption and anti-circumvention measures, and are therefore nothing more than impermissible "prophylaxis upon prophylaxis." *Wisconsin Right to Life*, 551 U.S. at 479 (plurality op.). If Congress wishes to address the hypothetical problem the government and district court have posited, it must do so through measures that target that precise evil and do not unnecessarily intrude on fundamental First Amendment rights. Because BCRA's aggregate contribution limits do precisely the opposite, they impermissibly burden protected First Amendment activity and are unconstitutional.

CONCLUSION

For these reasons, the Court should reverse the decision below and remand for entry of a permanent injunction.

Respectfully submitted,

Dan Backer
Paul Henry Jossey
DB CAPITOL
STRATEGIES, PLLC
Suite 2109
209 Pennsylvania Ave. SE
Washington, DC 20003

Michael T. Morley
Counsel of Record
223 Pawnee Rd.
Cranford, NJ 07016
(860) 778-3883
michaelmorleyesq
@hotmail.com

Jerad Wayne Najvar
NAJVAR LAW FIRM
1 Greenway Plaza, Ste. 100
Houston, TX 77046

Counsel for Plaintiff-Appellant Shaun McCutcheon

May 6, 2013

STATUTORY APPENDIX

TABLE OF CONTENTS

U.S. Const. amend. I 1a
2 U.S.C. § 441a(a) 2a
2 U.S.C. § 441f 8a
18 U.S.C. § 608 (1970 ed. Supp. IV) 9a
11 C.F.R. § 100.5(g) 19a
11 C.F.R. § 110.4(b) 23a
11 C.F.R. § 110.5 ..... 24a
11 C.F.R. § 110.6 ..... 27a

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2 U.S.C. § 441a(a)

Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) Except as provided in subsection (i) of this section and section 441a-1 of this title, no person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $25,000;

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed$5,000; or

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which

are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—

(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that (A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fund raising efforts; (B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and (C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign a committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of title 26. In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or

local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political

party, shall be considered to be contributions made to such party committee; and

(iii) the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and[1]

(C) if—

(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 434(f)(3) of this title); and

(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and

(D) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the

---

[1] So in original. The word "and" probably should not appear.

candidate of such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

2 U.S.C. § 441f

Contributions in name of another prohibited

No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

18 U.S.C. § 608 (1970 ed., Supp. IV)

Limitations on political contributions and purchases.

(a) *Personal funds of candidate and family.*

(1) No candidate may make expenditures from his personal funds, or the personal funds of his immediate family, in connection with his campaigns during any calendar year for nomination for election, or for election, to Federal office in excess of, in the aggregate-

(A) $50,000, in the case of a candidate for the office of President or Vice President of the United States;

(B) $35,000, in the case of a candidate for the office of Senator or for the office of Representative from a State which is entitled to only one Representative; or

(C) $25,000, in the case of a candidate for the office of Representative, or Delegate or Resident Commissioner, in any other State.

For purposes of this paragraph, any expenditure made in a year other than the calendar year in which the election is held with respect to which such expenditure was made, is considered to be made during the calendar year in which such election is held.

(2) For purposes of this subsection, "immediate family" means a candidate's spouse, and any child, parent, grandparent, brother, or sister of the candidate, and the spouses of such persons.

(3) No candidate or his immediate family may make loans or advances from their personal funds in connection with his campaign for nomination for election, or for election, to Federal office unless such loan or advance is evidenced by a written instrument fully disclosing the terms and conditions of such loan or advance.

(4) For purposes of this subsection, any such loan or advance shall be included in computing the total amount of such expenditures only to the extent of the balance of such loan or advance outstanding and unpaid.

(b) *Contributions by persons and committees.*

(1) Except as otherwise provided by paragraphs (2) and (3), no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.

(2) No political committee (other than a principal campaign committee) shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $5,000. Contributions by the national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States shall not exceed the limitation imposed by the preceding sentence with respect to any other candidate for Federal office. For purposes of this paragraph, the term "political committee" means an organization registered as a political committee under section 433, Title 2, United

States Code, for a period of not less than 6 months which has received contributions from more than 50 persons and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made in a year other than the calendar year in which the election is held with respect to which such contribution was made, is considered to be made during the calendar year in which such election is held.

(4) For purposes of this subsection-

(A) contributions to a named candidate made to any political committee authorized by such candidate, in writing, to accept contributions on his behalf shall be considered to be contributions made to such candidate; and

(B) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(5) The limitations imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States

(except a general election for such office) shall be considered to be one election.

(6) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(c) *Limitations on expenditures.*

(1) No candidate shall make expenditures in excess of—

(A) $10,000,000, in the case of a candidate for nomination for election to the office of President of the United States, except that the aggregate of expenditures under this subparagraph in any one State shall not exceed twice the expenditure limitation applicable in such State to a candidate for nomination for election to the office of Senator, Delegate, or Resident Commissioner, as the case may be;

(B) $20,000,000, in the case of a candidate for election to the office of President of the United States;

(C) in the case of any campaign for nomination for election by a candidate for the office of Senator or by a candidate for the office of

Representative from a State which is entitled to only one Representative, the greater of-

(i) 8 cents multiplied by the voting age population of the State (as certified under subsection (g)); or

(ii) $100,000;

(D) in the case of any campaign for election by a candidate for the office of Senator or by a candidate for the office of Representative from a State which is entitled to only one Representative, the greater of—

(i) 12 cents multiplied by the voting age population of the State (as certified under subsection (g)); or

(ii) $150,000;

(E) $70,000, in the case of any campaign for nomination for election, or for election, by a candidate for the office of Representative in any other State, Delegate from the District of Columbia, or Resident Commissioner; or

(F) $15,000, in the case of any campaign for nomination for election, or for election, by a candidate for the office of Delegate from Guam or the Virgin Islands.

(2) For purposes of this subsection-

(A) expenditures made by or on behalf of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be expenditures made by or on behalf of the

candidate of such party for election to the office of President of the United States; and

(B) an expenditure is made on behalf of a candidate, including a vice presidential candidate, if it is made by—

(i) an authorized committee or any other agent of the candidate for the purposes of making any expenditure; or

(ii) any person authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate, to make the expenditure.

(3) The limitations imposed by subparagraphs (C), (D), (E), and (F) of paragraph (1) of this subsection shall apply separately with respect to each election.

(4) The Commission shall prescribe rules under which any expenditure by a candidate for presidential nomination for use in 2 or more States shall be attributed to such candidate's expenditure limitation in each such State, based on the voting age population in such State which can reasonably be expected to be influenced by such expenditure.

(d) *Adjustment of limitations based on price index.*

(1) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the per centum difference between the price

index for the 12 months preceding the beginning of such calendar year and the price index for the base period. Each limitation established by subsection (c) and subsection (f) shall be increased by such per centum difference. Each amount so increased shall be the amount in effect for such calendar year.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means the calendar year 1974.

(e) *Expenditure relative to clearly identified candidate.*

(1) No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c)(2)(B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

(2) For purposes of paragraph (1)—

(A) "clearly identified" means—

(i) the candidate's name appears;

(ii) a photograph or drawing of the candidate appears; or

(iii) the identity of the candidate is apparent by unambiguous reference; and

(B) "expenditure" does not include any payment made or incurred by a corporation or a labor organization which, under the provisions of the last paragraph of section 610, would not constitute an expenditure by such corporation or labor organization.

(f) *Exceptions for national and State committees.*

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) and (3) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (g)). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (g)); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(g) *Voting age population estimates.* During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(h) *Knowing violations.* No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political

committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

(i) *Penalties.* Any person who violates any provision of this section shall be fined not more than $25,000 or imprisoned not more than 1 year, or both.

11 C.F.R. § 100.5(g)

(g) *Affiliated committee.* (1) All authorized committees of the same candidate for the same election to Federal office are affiliated.

(2) All committees (including a separate segregated fund, see 11 CFR part 114) established, financed, maintained or controlled by the same corporation, labor organization, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. *Local unit* may include, in appropriate cases, a franchisee, licensee, or State or regional association.

(3) Affiliated committees sharing a single contribution limitation under paragraph (g)(2) of this section include all of the committees established, financed, maintained or controlled by—

(i) A single corporation and/or its subsidiaries;

(ii) A single national or international union and/or its local unions or other subordinate organizations;

(iii) An organization of national or international unions and/or all its State and local central bodies;

(iv) A membership organization, (other than political party committees, *see* 11 CFR 110.3(b)) including trade or professional associations, *see* 11 CFR 114.8(a), and/or related State and local entities of that organization or group; or

(v) The same person or group of persons.

(4)(i) The Commission may examine the relationship between organizations that sponsor committees, between the committees themselves, or between one sponsoring organization and a committee established by another organization to determine whether committees are affiliated.

(ii) In determining whether committees not described in paragraphs (g)(3) (i)-(iv) of this section are affiliated, the Commission will consider the circumstantial factors described in paragraphs (g)(4)(ii) (A)through (J) of this section. The Commission will examine these factors in the context of the overall relationship between committees or sponsoring organizations to determine whether the presence of any factor or factors is evidence of one committee or organization having been established, financed, maintained or controlled by another committee or sponsoring organization. Such factors include, but are not limited to:

(A) Whether a sponsoring organization owns controlling interest in the voting stock or securities of the sponsoring organization of another committee;

(B) Whether a sponsoring organization or committee has the authority or ability to direct or participate in the governance of another sponsoring organization or committee through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;

(C) Whether a sponsoring organization or committee has the authority or ability to hire,

appoint, demote or otherwise control the officers, or other decision-making employees or members of another sponsoring organization or committee;

(D) Whether a sponsoring organization or committee has a common or overlapping membership with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;

(E) Whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;

(F) Whether a sponsoring organization or committee has any members, officers or employees who were members, officers or employees of another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees, or which indicates the creation of a successor entity;

(G) Whether a sponsoring organization or committee provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization or committee, such as through direct or indirect payments for administrative, fundraising, or other costs, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17;

(H) Whether a sponsoring organization or committee causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17;

(I) Whether a sponsoring organization or committee or its agent had an active or significant role in the formation of another sponsoring organization or committee; and

(J) Whether the sponsoring organizations or committees have similar patterns of contributions or contributors which indicates a formal or ongoing relationship between the sponsoring organizations or committees.

(5) Notwithstanding paragraphs (g)(2) through (g)(4) of this section, no authorized committee shall be deemed affiliated with any entity that is not an authorized committee.

11 C.F.R. § 110.4(b)

(b) *Contributions in the name of another.* (1) No person shall—

(i) Make a contribution in the name of another;

(ii) Knowingly permit his or her name to be used to effect that contribution;

(iii) Knowingly help or assist any person in making a contribution in the name of another; or

(iv) Knowingly accept a contribution made by one person in the name of another.

(2) Examples of *contributions in the name of another* include—

(i) Giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made, *see* 11 CFR 110.6; or

(ii) Making a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source.

11 C.F.R. § 110.5

(a) *Scope.* This section applies to all contributions made by any individual, except individuals prohibited from making contributions under 11 CFR 110.20 and 11 CFR part 115.

(b) *Biennial limitations.* (1) In the two-year period beginning on January 1 of an odd-numbered year and ending on December 31 of the next even-numbered year, no individual shall make contributions aggregating more than $95,000, including no more than:

(i) $37,500 in the case of contributions to candidates and the authorized committees of candidates; and

(ii) $57,500 in the case of any other contributions, of which not more than $37,500 maybe attributable to contributions to political committees that are not political committees of any national political parties.

(2) [Reserved by 73 FR 79602]

(3) The contribution limitations in paragraph (b)(1)of this section shall be increased by the percent difference in the price index in accordance with 11 CFR 110.17. The increased contribution limitations shall be in effect for the two calendar years starting on January 1 of the year in which the contribution limitations are increased.

(4) In every odd-numbered year, the Commission will publish in the FEDERAL REGISTER the amount of the contribution

limitations in effect and place such information on the Commission's Web site.

(c)(1) Contributions made on or after January 1, 2004. Any contribution subject to this paragraph (c)(1) to a candidate or his or her authorized committee with respect to a particular election shall be considered to be made during the two-year period described in paragraph (b)(1) of this section in which the contribution is actually made, regardless of the year in which the particular election is held. See 11 CFR 110.1(b)(6). This paragraph (c)(1) also applies to earmarked contributions and contributions to a single candidate committee that has supported or anticipates supporting the candidate.

(2) Contributions made prior to January 1, 2004. (i) For purposes of this paragraph (c)(2), a contribution to a candidate or his or her authorized committee with respect to a particular election shall be considered to be made during the calendar year in which such election is held.

(ii) For purposes of this paragraph (c)(2), any contribution to an unauthorized committee shall not be considered to be made during the calendar year in which an election is held unless:

(A) The political committee is a single candidate committee which has supported or anticipates supporting the candidate; or

(B) The contribution is earmarked by the contributor for a particular candidate with respect to a particular election.

(d) *Independent expenditures.* The biennial limitation on contributions in made to persons, including political committees, making ind pendent expenditures under 11 CFR part 109.

(e) *Contributions to delegates and elegate committees.* The biennial limitation on contributions in this section applies to contributions to delegate and delegate committees under 11 CFR 110.14.

11 C.F.R. § 110.6

(a) *General.* All contributions by a person made on behalf of or to a candidate, including contributions which are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit, are contributions from the person to the candidate.

(b) *Definitions.* (1) For purposes of this section, *earmarked* means a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.

(2) For purposes of this section, *conduit or intermediary* means any person who receives and forwards an earmarked contribution to a candidate or a candidate's authorized committee, except as provided in paragraph(b)(2)(i) of this section.

(i) For purposes of this section, the following persons shall not be considered to be conduits or intermediaries:

(A) An individual who is an employee or a full-time volunteer working for the candidate's authorized committee, provided that the individual is not acting in his or her capacity as a representative of an entity prohibited from making contributions;

(B) A fundraising representative conducting joint fundraising with the candidate's authorized committee pursuant to 11 CFR 102.17 or 9034.8;

(C) An affiliated committee, as defined in 11 CFR 100.5(g);

(D) A commercial fundraising firm retained by the candidate or the candidate's authorized committee to assist in fundraising; and

(E) An individual who is expressly authorized by the candidate or the candidate's authorized committee to engage in fundraising, and who occupies a significant position within the candidate's campaign organization, provided that the individual is not acting in his or her capacity as a representative of an entity prohibited from making contributions.

(ii) Any person who is prohibited from making contributions or expenditures in connection with an election for Federal office shall be prohibited from acting as a conduit for contributions earmarked to candidates or their authorized committees. The provisions of this section shall not restrict the ability of an organization or committee to serve as a collecting agent for a separate segregated fund pursuant to 11 CFR 102.6.

(iii) Any person who receives an earmarked contribution shall forward such earmarked contribution to the candidate or authorized committee in accordance with 11 CFR 102.8, except that—

(A) A fundraising representative shall follow the joint fundraising procedures set forth at 11 CFR 102.17.

(B) A person who is prohibited from acting as a conduit pursuant to paragraph (b)(2)(ii) of this section shall return the earmarked contribution to the contributor.

(c) *Reporting of earmarked contributions*—(1) *Reports by conduits and intermediaries.* (i) The intermediary or conduit of the earmarked contribution shall report the original source and the recipient candidate or authorized committee to the Commission or the Secretary of the Senate, as appropriate (see 11 CFR part 105), and to the recipient candidate or authorized committee.

(ii) The report to the Commission or Secretary shall be included in the conduit's or intermediary's report for the reporting period in which the earmarked contribution was received, or, if the conduit or intermediary is not required to report under 11 CFR part 104, by letter to the Commission within thirty days after forwarding the earmarked contribution.

(iii) The report to the recipient candidate or authorized committee shall be made when the earmarked contribution is forwarded to the recipient candidate or authorized committee pursuant to 11 CFR 102.8.

(iv) The report by the conduit or intermediary shall contain the following information:

(A) The name and mailing address of each contributor and, for each earmarked contribution in excess of $200, the contributor's occupation and the name of his or her employer;

(B) The amount of each earmarked contribution, the date received by the conduit, and the intended recipient as designated by the contributor; and

(C) The date each earmarked contribution was forwarded to the recipient candidate or authorized committee and whether the earmarked contribution was forwarded in cash or by the contributor's check or by the conduit's check.

(v) For each earmarked contribution passed through the conduit's or intermediary's account, the information specified in paragraph (c)(1)(iv)(A) through (C) of this section shall be itemized on the appropriate schedules of receipts and disbursements attached to the conduit's or intermediary's report, or shall be disclosed by letter, as appropriate. For each earmarked contribution forwarded in the form of the contributor's check or other written instrument, the information specified in paragraph (c)(1)(iv)(A) through (C) of this section shall be disclosed as a memo entry on the appropriate schedules of receipts and disbursements attached to the conduit's or intermediary's report, or shall be disclosed by letter, as appropriate.

(2) *Reports by recipient candidates and authorized committees.* (i) The recipient candidate or authorized committee shall report each conduit or intermediary who forwards one or more earmarked contributions which in the aggregate exceed $200 in any calendar year.

(ii) The report by the recipient candidate or authorized committee shall contain the following information:

(A) The identification of the conduit or intermediary, as defined in 11 CFR 100.12;

(B) The total amount of earmarked contributions received from the conduit or intermediary and the date of receipt; and

(C) The information required under 11 CFR 104.3(a) (3) and (4) for each earmarked contribution which in the aggregate exceeds $200 in any calendar year.

(iii) The information specified in paragraph (c)(2)(ii)(A) through (C) of this section shall be itemized on Schedule A attached to the report for the reporting period in which the earmarked contribution is received.

(d) *Direction or control.* (1) A conduit's or intermediary's contribution limits are not affected by the forwarding of an earmarked contribution except where the conduit or intermediary exercises any direction or control over the choice of the recipient candidate.

(2) If a conduit or intermediary exercises any direction or control over the choice of the recipient candidate, the earmarked contribution shall be considered a contribution by both the original contributor and the conduit or intermediary. If the conduit or intermediary exercises any direction or control over the choice of the recipient candidate, the report filed by the conduit or intermediary and the report filed by

the recipient candidate or authorized committee shall indicate that the earmarked contribution is made by both the original contributor and the conduit or intermediary, and that the entire amount of the contribution is attributed to each.

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
MAY 6 - 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 12-536

In The
Supreme Court of the United States

Shaun McCutcheon and Republican National Committee, *Plaintiffs-Appellants*

v.

Federal Election Commission

On Appeal from the United States District Court
for the District of Columbia

Brief on the Merits for Appellant Republican National Committee

---

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Anita Y. Woudenberg
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/235-3685 facsimile
jboppjr@aol.com
Counsel for Republican National Committee

Stephen M. Hoersting
700 E. Schantz Ave.
Dayton, OH 45419
Hoersting@gmail.com
937/623-6102
Of Counsel

May 6, 2013

Questions Presented

Federal law imposes two types of limits on political contributions by individuals. *Base limits* restrict the amount an individual may contribute to a particular candidate committee ($2,600 per election); national party committee ($32,400 per calendar year); state, district, and local party committee ($10,000 per calendar year (combined limit)); and political action committee ("PAC") ($5,000 per calendar year). 2 U.S.C. 441a (a)(1) (with current limits added here). *See* Merits Brief Appendix ("MB-App.") 3a, 17a.

Aggregate limits restrict the total contributions an individual may make in a biennial election cycle as follows: $48,600 to candidate committees and $74,600 to non-candidate committees, of which no more than $48,600 may go to non-national party committees (i.e., state, district, and local party committees (combined) and PACs). 2 U.S.C. 441a(a)(3) (with current limits added here). *See* MB-App. 4a, 17a.

Appellant presents these questions:

1. Whether the $74,600 aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), is unconstitutional as applied to contributions to national party committees.

2. Whether the $74,600 aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), is unconstitutional facially.

3. Whether the $48,600 aggregate sub-limit on contributions to non-national party committees, 2 U.S.C. 441a(a)(3)(B), is severable.

4. Whether the $48,600 aggregate limit on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A), is unconstitutional.

Corporate Disclosure

The Republican National Committee ("RNC") is an unincorporated association, so no corporations are involved.

Table of Contents

Questions Presented. . . . . (i)

Corporate Disclosure. . . . . (ii)

Table of Contents. . . . . (iii)

Table of Authorities. . . . . (viii)

Opinion Below. 1

Jurisdiction. 1

Constitution, Statutes & Regulations. 1

Statement of the Case. 1

Summary of the Argument. 6

Argument. 7

I. Aggregate Limits Fail Exacting Scrutiny, Though Strict Scrutiny Should Apply. 7

A. Aggregate Limits Should Not Be Treated as Mere Base Contribution Limits. 8

B. Under *Buckley*'s Scrutiny Dichotomy, Strict Scrutiny Applies Because the Speech Burden Is Cognizable. 12

C. Alternatively, Strict Scrutiny Should Apply Under Substantial-Burden Analysis.. 14

II. The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Unconstitutional as Applied to National Party Committees.. 14

A. *Buckley*'s Facial Upholding of the "Ceiling" Does Not Control this Case, but this Court Should Apply *Buckley*'s Analysis.. 15

B. Congress Fixed *Buckley*'s Posited Conduit-Contribution Mechanism... 19

C. In BCRA, Congress Repealed and Replaced the "Ceiling" with Multiple Aggregate limits.. 24

D. The $74,600 Aggregate Limit Lacks a Cognizable Interest as Applied to National Party Committees.. 24

1. The Anti-Corruption Interest Is Not Directly Implicated... 25

2. No Conduit-Contribution Concern Exists... 26

(a) The Government's Ability to Assert a Conduit-Contribution Concern Is Limited in Scope.. 27

(b) *Buckley* Requires Examination of the Potential for Political-Committee Proliferation, "Huge" Contributions, and Conduit-Capability... 31

(c) Congress Imposed a *Political-Committee Proliferation* Prophylaxis.. 32

(d) Congress Imposed a *Huge-Contribution* Prophylaxis.. 34

(e) Congress Imposed an *Anti-Conduit* Prophylaxis by Many Prophylaxes.. 37

3. The Aggregate Limit Relies on an Unconstitutional Equalizing Interest.. 44

4. The Lower Court's Posited Conduit-Contribution Mechanism Fails Scrutiny.. 44

III. The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Facially Unconstitutional.. 52

IV. The $48,600 Aggregate Limit on Contributions to State Party Committees and PACs Is Non-Severable and So Should Be Struck.. 52

V. The $48,600 Aggregate Limit on Contributions to Candidates Is Unconstitutional... . . 53

A. The Applicable Concern Is Preventing Conduit-Contributions..... 54

B. The Government Cannot Justify the Aggregate Limit Under Either Exacting or Strict Scrutiny..... 55

Conclusion..... 60

Merits Brief Appendix Contents

U.S. Constitution, Amendment I..... 1a

18 U.S.C. 608(b) (1974)..... 1a

2 U.S.C. 441a(a)(1)-(5), (8)..... 3a

2 U.S.C. 441f..... 6a

11 C.F.R. 100.5(g)..... 7a

11 C.F.R. 110.4(b)..... 10a

11 C.F.R. 110.5(a)-(b)..... 11a

11 C.F.R. 110.6..... 12a

FEC, *Contribution Limits for 2013-2014*..... 17a

Buckley-Scheme and BCRA-Scheme Charts..... 18a

Table of Authorities

Cases

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011)..... 14

Blount v. Rizzi, 400 U.S. 410 (1971)..... 53

Broadrick v. Oklahoma, 413 U.S. 601 (1973). 52

Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999)..... 11

Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975). .. 11

Buckley v. Valeo, 424 U.S. 1 (1976). ..... *passim*

California Medical Association v. FEC, 453 U.S. 182 (1981)..... 22-24, 31

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981)..... 13

Citizens United v. FEC, 130 S. Ct. 876 (2010). *passim*

Davis v. FEC, 554 U.S. 724, 744 (2008)..... 14

EMILY's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009).. 25

FEC v. Beaumont, 539 U.S. 146 (2003)..... 7

FEC v. Colorado Republican Federal Campaign Committee., 518 U.S. 604 (1996)..... 7, 26

FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001) 11, 26, 43, 46, 48-49

FEC v. Craig, No. 12-0958, 2013 WL 1248271, (D.D.C. Mar. 28, 2013). 22

FEC v. National Conservative PAC, 470 U.S. 480 (1985). 25, 38

FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007). 31

McConnell v. FEC, 540 U.S. 93 (2003). 21, 30, 36

NAACP v. Button, 371 U.S. 415 (1963). 7

Randall v. Sorrell, 548 U.S. 230 (2006) 9, 11, 13, 35, 53, 56, 58

Republican Party of Minnesota v. White, 536 U.S. 765 (2002). 44

Turner Broadcasting System v. FCC, 512 U.S. 622 (1994). 29, 48

Constitutions, Statutes, Regulations & Rules

2 U.S.C. 437g. 51

2 U.S.C. 439a(a)(4). 54

2 U.S.C. 441a(a)(1). 1, 23, 52

2 U.S.C. 441a(a)(3). 1

2 U.S.C. 441a(a)(3)(A). 5, 6, 53, 59, 60

2 U.S.C. 441a(a)(3)(B). . . . . (i), 4-6, 24, 42, 52, 60

2 U.S.C. 441a(a)(4). 20

2 U.S.C. 441f. 1

18 U.S.C. 608(b) (1974). 1

27 U.S.C. 427. 30

11 C.F.R. 100.5(g). 1, 22, 32

11 C.F.R. 100.5(g)(3). 33

11 C.F.R. 100.5(g)(3)(iv). 33

11 C.F.R. 102.17. 47

11 C.F.R. 110.1(b). 47

11 C.F.R. 110.1(h). 40

11 C.F.R. 110.2(h). 40

11 C.F.R. 110.3(a). 22, 33

11 C.F.R. 110.3(b)(1)-(2). 33

11 C.F.R. 110.3(c). 20

11 C.F.R. 110.3(c)(1). 20

11 C.F.R. 110.4(b). 1, 39

11 C.F.R. 110.5. . . . . 1, 19

11 C.F.R. 110.6. . . . . 1, 2, 40

11 C.F.R. 110.6(a). 39

11 C.F.R. 110.6(b)(1). 39

11 C.F.R. 113.1(g). 22

11 C.F.R. 113.2. 22

11 C.F.R. 113.2(c). 54

Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002). . . . . *passim*

FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976).. 19

Federal Election Campaign Act. . . . . *passim*

Pub. L. 96-187, 93 Stat. 1339 (1980). 22

U.S. Constitution, amend. I. . . . . *passim*

Other Authorities

120 Cong. Rec. 27,224 (1974). 44

Robert Bauer, *The McCutcheon Case and the Contribution/Expenditure Limit Problem*, More Soft Money Hard Law, Apr. 26, 2013, http://www.moresoftmoneyhardlaw.com/

2013/04/contributions-and-expenditures-in-campaign-finance-jurisprudence/. 10, 11

Center for Responsive Politics, *Restore Our Future Contributors*, http://www.opensecrets.org/pacs/ pacgave2.php?sort =A&cmte=C00490045& cycle=2012&Page=1. . 12

FEC, Advisory Opinion 2010-09 (Club for Growth) 13, 40

FEC, *Contribution Limits for 2013-2014*. 1

FEC, Matter Under Review 3620 (Democratic Senatorial Campaign Committee). 29, 41, 49

FEC, *Political Party Committees* (2009).. 40

House Conference Report No. 94-1057, H.R. Rep. No. 94-1057 (1976).. 22

Anupama Narayanswamy, *Presidential campaign donors moving to super PACs*, Sunlight Reporting Group, Apr. 26, 2012, http://reporting.sunlightfoundation. com/2012/maxed-out-donors/. 30

Opinion Below

The Memorandum Opinion is in the Jurisdictional Statement Appendix ("JS-App."), at 1a, and at 893 F. Supp. 2d 133. The Order and Final Judgment is at JS-App. 17a.

Jurisdiction

On September 28, 2012, the lower court entered final judgment for the FEC. JS-App. 17a. Appellants noticed appeal October 10. JS-App. 18a. This Court has appellate jurisdiction under Bipartisan Campaign Reform Act ("BCRA") § 403(a)(3) (JS-App. 21a).

Constitution, Statutes & Regulations

Appended hereto are U.S. Constitution, Amendment I; 18 U.S.C. 608(b) (1974); 2 U.S.C. 441a(a)(1)-(5), (8); 2 U.S.C. 441f; 11 C.F.R. 100.5(g); 11 C.F.R. 110.4(b); 11 C.F.R. 110.5(a)-(b); and 11 C.F.R. 110.6.

Statement of the Case

Base limits restrict contributions to candidates, political parties, and PACs. 2 U.S.C. 441a(a)(1). *Aggregate limits* restrict individuals' aggregate biennial contributions to these entities. 2 U.S.C. 441a(a)(3). *See* MB-App. 17a (FEC, *Contribution Limits for 2013-2014*).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court facially upheld an "overall $25,000 ceiling" on an individual's aggregate contributions because it

> serve[d] to prevent *evasion* of the $1,000 [base] *contribution limitation* [on a contribution to a candidate] by a person who might otherwise contribute massive amounts of money *to a particular candidate* through the use of unearmarked contributions to political committees

> likely to contribute to that candidate, or huge contributions to the candidate's political party.

Id. (emphasis added). This anti-*circumvention* concern is in contrast to the anti-*corruption* interest on which *Buckley* upheld the $1,000 base limit. *Id.* at 26. Crucially, *Buckley* posited a circumvention *mechanism* for a conduit-contribution,[1] i.e., a "huge" contribution to a political party or PAC, resulting in "massive" contributions to a "particular candidate." This mechanism resulted from the Federal Election Campaign Act ("FECA") (2 U.S.C. 431 et seq.) scheme then in effect.

***Buckley* Scheme**

$25,000

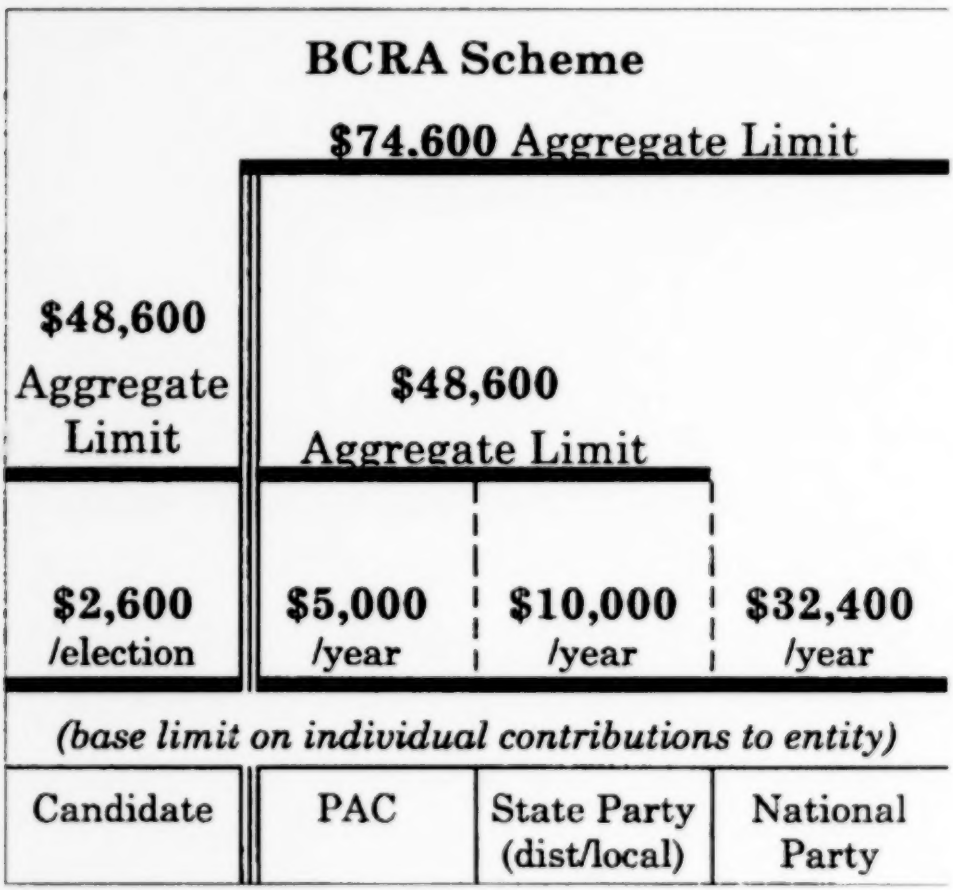
"Ceiling" on Individual Contributions

$1,000 /elec'n *(base limit)*			
Candidate	PAC	State Party (dist/local)	National Party

[1] "Conduit-contribution" is used herein to refer to a contribution to a particular, intended candidate, resulting from an *unearmarked* contribution to another entity that results in the contribution to the candidate, without violating earmarking and name-of-another contribution laws. *Earmarked* contributions to candidates through intermediaries are legal if all base limit and reporting requirements are followed. *See* 11 C.F.R. 110.6 ("Earmarked contributions"). MB-App. 12a.

See Buckley, 424 U.S. at 189-90 (1974 FECA text).

The *Buckley*-Scheme Chart, *supra* at 2, shows that the scheme *Buckley* considered only had a base limit on a contribution to a *candidate*. As *Buckley* noted, absent the "ceiling" a "huge" contribution *could* go to a political party or PAC. 424 U.S. at 38. The "ceiling" was also a *base* limit for contributions to PACs and political parties—in which sense *Buckley* described it as a "corollary" of the base limits. *Id.*



See MB-App. 17a.

Soon after *Buckley*, Congress eliminated *Buckley*'s conduit-contribution mechanism by, inter alia, setting base limits on contributions to PACs and political parties. *See* Part II.B. BCRA made further changes, result-

ing in the scheme in the BCRA-Scheme Chart, *supra* at 3. *See also* MB-App. 18a (side-by-side *Buckley*- and BCRA-Scheme Charts). Base limits are in place for contributions to all types of political committees, with aggregate limits layered atop those.

In upholding the challenged aggregate limits, the lower court ignored this elimination of *Buckley*'s mechanism. The court did posit a *mechanism*, as *Buckley*'s analysis requires, but it was not the *conduit-contribution* mechanism required by *Buckley*'s analysis, and it was based on the forbidden *gratitude* theory of corruption.[2]

As set out in the Verified Complaint, McCutcheon challenges the $74,600 (currently) aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), as unconstitutional—as applied to contributions to national party committees and facially. He wants to express support for, and associate with, non-candidate committees as permitted by the base limits without an aggregate limit. But for this aggregate limit, McCutcheon would have contributed $25,000 each to the Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), and National Republican Congressional Committee ("NRCC") before the November 2012 election. When this case was brought, he had given $1,776

---

[2] The lower court acknowledged that "[g]ratitude . . . is not itself a constitutionally-cognizable form of corruption," but it simultaneously relied on a candidate "know[ing] precisely where to lay the wreath of *gratitude*" in the court's hypothetical circumvention mechanism. JS-App. 12a (emphasis added). *See Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010) ("Ingratiation and access . . . are not corruption.").

each to RNC, NRSC, and NRCC, $2,000 to a PAC, and $20,000 to a state party committee's federal fund.

McCutcheon also challenges the now-$48,600 aggregate limit on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A), as unconstitutional. He wants to express support for, and associate with, candidates as permitted by the base limits without an aggregate limit. When this case was filed, he had contributed $33,088 to federal candidates and intended to contribute $21,312 more to federal candidates. But for this aggregate limit, McCutcheon would have contributed $54,400 to candidates.

RNC, a national party committee, also challenges the $74,600 aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(B)—as applied to contributions to national party committees and facially. RNC wants to receive the speech and association of McCutcheon (and other contributors) as permitted by the base limits without an aggregate limit.

FEC is the agency with enforcement authority over FECA and BCRA.

Appellants intend materially similar future actions if not limited by aggregate limits. Absent relief, they will not act and so will be deprived of constitutional rights and will be irreparably harmed without an adequate legal remedy.

On June 22, 2012, Appellants filed their Verified Complaint. FEC moved for dismissal. On September 28, the lower court dismissed, entering judgment for FEC. JS-App. 1a, 17a. On October 10, Appellants noticed appeal. JS-App. 18a.

Summary of the Argument

The challenged limits are unconstitutional under the exacting scrutiny employed by the lower court, but strict scrutiny should apply because aggregate limits differ in kind from base limits, imposing greater burdens. Furthermore, the contribution/expenditure scrutiny dichotomy in *Buckley*, 424 U.S. at 25, 39-49, should be overruled, modified, or held inapplicable to aggregate limits.

The $74,600 aggregate limit on contributions to *non-candidate committees*, 2 U.S.C. 441a(a)(3)(B), is unconstitutional *as applied* to national party committees. *Buckley*'s facial upholding of the old "ceiling" does not control this case, but this Court's conduit-contribution analysis in *Buckley* should be followed. 424 U.S. at 38. *Buckley* based its conduit-contribution mechanism on (a) political-committee proliferation by the same persons, (b) "huge" contributions to political party committees (or PACs), and (c) "massive" conduit-contributions. Post-*Buckley* FECA amendments eliminated these elements of the mechanism. Under BCRA's changes, *Buckley*'s posited mechanism remains impossible, eliminating any conduit-contribution risk.

The $74,600 limit is *facially* unconstitutional due to substantial overbreadth.

The $48,600 sub-limit on contributions to non-national party committees, 441a(a)(3)(B), should be struck as non-severable.

The $48,600 aggregate limit on contributions to *candidates*, 2 U.S.C. 441a(a)(3)(A), is also unconstitutional. Under *Buckley*'s required conduit-contribution analysis, candidate committees posed no conduit-contribution risk when this Court decided *Buckley* and

they pose none now. Even under an anti-corruption-interest analysis, there is no quid-pro-quo risk from candidate *Z* knowing that an individual contributed the base-level amount to candidates *A*-*Y*. The aggregate limit is overbroad as to any anti-corruption interest or the conduit-contribution concern, so it is not properly tailored (closely or strictly) to the anti-corruption interest.

Argument

I.

Aggregate Limits Fail Exacting Scrutiny, Though Strict Scrutiny Should Apply.

Aggregate limits fail the exacting scrutiny that the lower court chose, but strict scrutiny should apply.

Buckley decided that contribution and expenditure limits "implicate fundamental First Amendment interests," but the latter "impose significantly more severe restrictions on . . . political expression and association." 424 U.S. at 23. Based on this dichotomy, *Buckley* is now commonly understood as applying exacting scrutiny to contribution limits, *id.* at 25, and strict scrutiny to expenditure limits, *id.* at 39-49. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 162 (2003).

The lower court cited *Buckley*'s contribution/expenditure scrutiny dichotomy and *labeled* aggregate limits as mere "contribution limits." JS-App. 6a-9a.[3] It applied exacting scrutiny, requiring only that the aggre-

---

[3] Government "cannot foreclose . . . constitutional rights by mere labels." *NAACP v. Button*, 371 U.S. 415, 429 (1963), *followed in FEC v. Colorado Republican Fed. Campaign Comm.*, 518 U.S. 604, 622 (1996) ("*Colorado-I*").

gate limits be "'closely drawn to match a sufficiently important interest.'" JS-App. 6a-9a (citation omitted).[4]

However, aggregate limits fail under the exacting scrutiny employed by the lower court. Exacting scrutiny is in fact an "exacting" test, and the government should not be allowed to essentially argue a rational-basis test. The lower court did not require the government to prove that the aggregate limits are supported by a "sufficiently important interest," let alone that they are "closely drawn" to a cognizable interest, or that the government has "avoid[ed] unnecessary abridgement" of First Amendment rights. *Buckley*, 424 U.S. at 25.

But aggregate limits materially differ from, and impose greater burdens than, ordinary contribution limits. So higher scrutiny should apply.

A. Aggregate Limits Should Not Be Treated as Mere Base Contribution Limits.

Since aggregate limits impose greater burdens than base limits, there is no principled way to apply the same scrutiny. They differ in two key respects.

First, they have different justifications. The justification for a *base* limit is the *quid-pro-quo* risk, *Buckley*, 424 U.S. at 26, based on the fact that a particular candidate *receives* the contribution. But an *aggregate* limit restricts an individual's total contributions, not any contribution received by a particular candidate, so *Buckley* required a *conduit-contribution* risk to justify it. *Id.* at 38. Thus, the limits differ in kind. *Cf. id.* at 30 (even "distinctions in degree become significant . . . when they . . . amount to differences in kind").

---

[4] The court ignored the requirement to "avoid unnecessary abridgement." *Buckley*, 424 U.S. at 25.

Second, while *base* limits restrict how *much* one may contribute to *particular* candidates, political parties, or PACs, *aggregate* limits restrict how *many* such entities one may support at the *full*-base-limit amount (what Congress contemplates an individual being *able* to give). *Buckley* agreed that the "ceiling" limited the "number of candidates and committees with which individuals may associate," though it held this restriction justified by a conduit-contribution risk. *Id.* at 38.[5] *Buckley*'s statements, however, do not justify *current* aggregate limits. *See* Part II. But *Buckley* does acknowledge that the burdens *differ*. Thus, applying the same scrutiny based on mere *labeling* is erroneous.

The *Buckley*- and BCRA-Scheme Charts, MB-App. 18a, show how the scheme has changed. With base limits for all entities, BCRA layers aggregate limits *atop* them, restricting how much an individual may *spend* on political expression and association at the full-base-limit level. Thus, though the aggregate limits are not expenditure limits in the sense of directly limiting an individual's expenditures for, e.g., ads, they are more in the nature of an expenditure limit than a contribution limit, and expenditure limits are *per se* unconstitutional. *Randall v. Sorrell*, 548 U.S. 230, 242-46 (2006) (plurality).

The fact that aggregate limits are not actually contribution limits is well stated by Bob Bauer:

---

[5] This refutes any notion that aggregate limits impose no association burden because one may associate with many candidates or committees at lower levels. Burdens should be analyzed on the basis of full-base-level contributions, above which Congress asserted no cognizable interest.

> [T]he [aggregate limit] is not [the] same as a contribution limit in the traditional sense. Most contributions are made specifically to someone or some entity, and the limit on contributions decreases the risk of corrupting that *particular* someone or entity. The overall limit might seem more like a ceiling on spending. The individual subject to this limit is unable to spend more than an amount fixed by statute for all her contributions in the aggregate. The result is an aggregate limit which smacks of a spending limit . . . ."

Robert Bauer, *The McCutcheon Case and the Contribution/Expenditure Limit Problem*, More Soft Money Hard Law, Apr. 26, 2013, http://www.moresoftmoneyhardlaw.com/2013/04/contributions-and-expenditures-in-campaign-finance-jurisprudence/ (emphasis in original).

Bauer then notes that aggregate limits are sometimes deemed contribution limits because they are part of a *package* aiding enforcement. But he explains why that logic fails, based on the history of the *spending* limit in *Buckley*:

> [A]n aggregate limit . . . is assumed to be a contribution limit because it aids enforcement of such limits (the base limits). But this logic does not hold up well. In the Buckley case, the limit on aggregate spending was argued as necessary to enforce the contribution limits. The Court of Appeals had held that "We . . . uphold the expenditure ceilings imposed by [citation omitted] as an essential ingredient in the regulatory scheme propounded by this comprehensive legislation, one which reduces the incentive to cir-

> cumvent direct contribution limits and bans." (*Buckley v. Valeo*, 519 F.2d 821, [858-59 (D.C. Cir. 1975)]). The Supreme Court rejected this rationale in the case of this [expenditure] limit. But this history illustrates the larger point that a limit's function in enforcing contribution limits does not mean that it is, by definition, a *contribution limit*.

Id. (emphasis in original).[6]

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado-II*"), Justice Thomas, joined by Justice Scalia, called for the overruling of *Buckley*'s contribution/expenditure scrutiny dichotomy because strict scrutiny should extend to all core political activity, i.e., "the core speech and associational rights that our Founders sought to defend," *id.* at 465-66 (dissenting) (collecting cases).[7] This Court should overrule *Buckley*'s scrutiny dichotomy in this case. Alternatively, precedent requires strict scrutiny under two other approaches. *Infra* Parts I(B)-(C).

---

[6] Furthermore, this *Buckley* history demonstrates that limits must be scrutinized separately, not as part of "a coherent system" as the lower court did here. JS-App. 13a.

[7] *See also Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 192 n.12 (1999); *id.* at 206, 214 (Thomas, J., concurring in the judgment). *See also Randall*, 548 U.S. at 242-44 (2006) (plurality); *id.* at 263 (Alito, J., concurring in part and concurring in judgment); *id.* at 264 (Kennedy, J., concurring in judgment); *id.* at 266 (Thomas, J., joined by Scalia, J., concurring in judgment).

B. Under *Buckley*'s Scrutiny Dichotomy, Strict Scrutiny Applies Because the Speech Burden Is Cognizable.

If this Court retains its contribution/expenditure scrutiny dichotomy, it should apply strict scrutiny because aggregate limits impose greater speech burdens than base limits. Precedent requires strict scrutiny where such a cognizable speech burden exists.

Buckley recognized that base limits burden *both* expression and association rights, 424 U.S. at 23, but decided that a "limitation upon the amount that any . . . person . . . may contribute *to* a candidate or political committee entails only a marginal restriction upon the contributor's . . . free communication," *id.* at 20 (emphasis added). This addresses contributions "*to*" political entities, not *total contributions*. It applies to *base*, not *aggregate*, limits.

Furthermore, it is no longer true "that the contribution limitations . . . have [no] dramatic adverse effect on the funding of campaigns and political associations." *Buckley*, 424 U.S. at 21. While candidates and political parties raise substantial funds, they are increasingly being disadvantaged and marginalized vis-a-vis super-PACs,[8] which are not subject to aggregate limits.[9] The

---

[8] Restore Our Future, the leading super-PAC in 2012 (in fundraising and expenditures), had numerous individual donors giving it over $1 million, with some, like casino-magnate Sheldon Adelson and his wife, giving as much as $5 million each. CRP, *Restore Our Future Contributors*, http://www.opensecrets.org/pacs/pacgave2.php?sort=A&cmte=C00490045&cycle=2012&Page=1.

[9] Super-PACs are PACs that only make independent expenditures (not contributions) and which may receive

(continued...)

situation has changed since *Buckley*. And once a contributor has made a base-level contribution to nine candidates for *both* primary and general elections (dividing $48,600 by $5,200, *see supra* at i), or eighteen different candidates for single elections, the contributor cannot contribute to another, reducing that candidate's political speech, which cannot be made up by "merely . . . rais(ing) funds from a greater number of people." *Buckley*, 424 U.S. at 22.

Nor can individuals make up for their inability to make full-base-level contributions to as many candidates and political parties as they choose by volunteering to work for candidates and political parties. That might work where a single candidate or national party committee is involved, as with a base limit. But where an individual seeks to make full-base-level contributions to more than nine (or eighteen) candidates and to all three Republican national party committees, the option fails—time and energy preclude it.

Buckley indicated that where a cognizable speech burden is involved, higher scrutiny applies, *id.* at 23, 39-49, and as a result, this Court has applied strict scrutiny even to contribution limits. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 300 (1981) ("to limit the right of association places an impermissible restraint on . . . expression."); *Randall*, 548 U.S. at 261 (limit "so restrictive as to bring about . . . serious associational and expressive problems").

---

[9] (...continued)
unlimited contributions, including contributions earmarked for specific independent expenditures. *See* FEC, Advisory Opinion 2010-09 (Club for Growth) at 5, *available through* http://saos.nictusa.com/saos/searchao.

C. Alternatively, Strict Scrutiny Should Apply Under Substantial-Burden Analysis.

If this Court decides that *Buckley*'s contribution/expenditure scrutiny dichotomy is no longer useful but does not decide to strictly scrutinize *all* campaign-finance laws, it should apply strict scrutiny here because the aggregate limits impose a *substantial* burden. This occurred in recent decisions, including one involving contribution limits. *See Davis v. FEC*, 554 U.S. 724, 744 (2008) ("strength of . . . interest must reflect . . . seriousness of . . . actual burden on First Amendment rights"); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011) ("Arizona's . . . scheme substantially burdens protected political speech without serving a compelling state interest").

In sum, if the aggregate limits are labeled mere contribution limits and subjected to exacting scrutiny, they fail that *exacting* scrutiny. But this Court should apply strict scrutiny, and it should overrule *Buckley*'s contribution/expenditure scrutiny dichotomy. And this Court should require the government to actually *meet* its scrutiny burden, which the lower court did not do.

II.

The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Unconstitutional as Applied to National Party Committees.

The $74,600 aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), violates First Amendment free speech and association

rights as applied to contributions to national party committees.[10]

The aggregate limit serves no permissible purpose. In *Buckley*, this Court upheld a "ceiling" on individuals' aggregate contributions, 424 U.S. at 38, but that holding does not control here. However, this Court should follow its analysis in *Buckley*, *id.*, under which the aggregate limit is unconstitutional.

A. *Buckley*'s Facial Upholding of the "Ceiling" Does Not Control this Case, but this Court Should Apply *Buckley*'s Analysis.

Buckley recognized the core First Amendment rights at issue here. "[C]ontribution and expenditure limitations . . . [affect] the most fundamental First Amendment activities." *Id.* at 14. "[T]he First . . . Amendment[] guarantees freedom to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses (t)he right to associate with the political party of one's choice." *Id.* at 15 (citations and quotation marks omitted). "Making a contribution, like joining a political party, serves to affiliate a person with a candidate [or a political party]. . . . [I]t enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22.

Buckley rejected a constitutional challenge to a "ceiling" on an individual's contributions. *Id.* at 38. That

---

[10] Appellant addresses 441a(a)(3)(B) *before* 441a(a)(3)(A) because the analysis begins with *Buckley*'s conduit-contribution analysis and posited mechanism, 424 U.S. at 38, which identified concerns with political party committees (and PACs), *not* candidate committees. So the analysis first shows the elimination of *Buckley*'s conduit-contribution concern and mechanism.

holding does not control here because *Buckley* involved a *facial* challenge and Congress materially *altered* the statutory context by enacting new base limits and by replacing the "ceiling" with multiple aggregate limits.

But this Court's *analysis* in *Buckley* should be followed here. That analysis involves three key factors.

First, that analysis requires the government to prove a *conduit-contribution* risk (not the quid-pro-quo risk this Court applied to base limits, *id.* at 26). While the conduit-contribution risk derives from the quid-pro-quo risk, the quid-pro-quo risk does not arise unless a " *large* contribution [is] *given* to secure a political quid pro quo from current and potential office holders," i.e., a "large" contribution is actually "given" to a candidate. *Id.* (emphasis added). However, base limits *prevent* "large" contributions and an aggregate limit restricts what a contributor can spend on political contributions—not what is *given* to a candidate. So the government must specifically prove a "large"-*conduit-contribution* risk and may not meet its burden with broad-brush theories of *corruption* instead.

Second, *Buckley*'s analysis requires the government to prove this conduit-contribution risk by a *mechanism* showing *how* a "large" conduit-contribution might actually get to a particular, intended candidate with everyone abiding by existing laws. *Id.* at 38. This mechanism fails *per se* if it tries to show something *other* than a conduit-contribution risk, e.g., that some candidate might be grateful.

Third, *Buckley*'s analysis requires that the mechanism be based on the *function* of the aggregate limit *itself*. *Id.* That was the case with *Buckley*'s mechanism because the "ceiling" filled base-limit gaps. *See* MB-App. 18a. The "ceiling" actually provided the base lim-

its for political parties (and PACs), preventing "huge" contributions to them. 424 U.S. at 38. This Court based its mechanism in *Buckley* on this function of the "ceiling" itself.

Key to *Buckley*'s mechanism was the fact that FECA had only these applicable limits, *see id.* at 189:

- $1,000/election person-to-candidate base limit;
- $5,000/election limit on a contribution by a multicandidate political committees to a candidate;
- $25,000/biennium "ceiling" on all an individual's contributions.

See MB-App. 18a.

There were no limits on contributions *to* political party committees and PACs *other than* the "ceiling." Absent that "ceiling," individuals could give *unlimited* amounts to political parties (and PACs). Also missing was a restriction on political-committee proliferation by the same entities. *See infra* at 17-18. *Buckley* upheld the "ceiling" *facially*, in *that* context (though it was "not . . . separately addressed at length by the parties"). *Id.* at 38. The key was *Buckley*'s posited conduit-contribution mechanism:

> The . . . ceiling . . . . prevent[s] evasion of the $1,000 contribution limitation by a person who might otherwise contribute *massive* amounts of money *to a particular candidate* through the use of unearmarked contributions *to political committees likely to contribute to that candidate*, or *huge* contributions *to the candidate's political party*.

Id. (emphasis added).

Essential to this analysis is the Court's earlier highlighting of the political-committee proliferation prob-

lem, which, the Court noted (regarding the base limit's tailoring), left "persons free . . . to assist to a . . . substantial extent in supporting candidates and committees with financial resources [FN31]." *Id.* at 28. The Court explained political-committee proliferation:

> [FN 31] While providing significant limitations on the ability . . . to contribute large amounts of money to candidates, the Act's contribution ceilings do not foreclose . . . making . . . substantial contributions to candidates by some major special-interest groups through the combined effect of individual contributions from adherents or the *proliferation* of political funds each authorized under the Act to contribute to candidates. . . . [FECA] permits corporations and labor unions to establish segregated funds . . . for political purposes. . . . Each separate fund may contribute up to $5,000 per candidate per election . . . .
>
> *The Act places no limit on the number of funds that may be formed through the use of subsidiaries or divisions of corporations, or of local and regional units of a national labor union. The potential for proliferation of these sources of contributions is not insignificant.* . . .

Id. at 28 n.31 (emphasis added; citations omitted).

In sum, the analytical key to *Buckley*'s facial upholding is its posited conduit-contribution mechanism based on (a) political-committee proliferation by the same entities, (b) a "huge" contribution to a political party (or PAC), and (c) a resulting capability for "massive" conduit-contributions from an individual to a particular, intended candidate.

B. Congress Fixed *Buckley*'s Posited Conduit-Contribution Mechanism.

Congress promptly eliminated *Buckley*'s conduit-contribution concern and mechanism. It eliminated "huge" contributions to political parties (or PACs) by adding new limits on contributions to and by entities:

- $1,000/election person-to-candidate base limit;
- (*new*) $20,000/year base limit by "persons" *to* national party committees;
- (*new*) $5,000/year base limit by "persons" *to* other political committees;
- by "multicandidate committees"[11] as follows—
  - $5,000/election to candidates,
  - (*new*) $15,000/year *to* national party committees,
  - (*new*) $5,000/year *to* other political committees;
- $25,000/biennium "ceiling" on all an individual's contributions.[12]

See FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976). *See also* 2 U.S.C. 441a(a)(1).

These new limits, without more, eliminate *Buckley*'s conduit-contribution concern and mechanism. These limits represent the level at which Congress recognized and asserted relevant interests. Only a "large" contribution *to a candidate* triggers the quid-pro-quo risk. 424 U.S. at 23-27. The concern supporting limits on contributions *to political parties and PACs* is *Buckley*'s conduit-contribution risk, *id.* at 38, but only "huge"

---

[11] *See* 11 C.F.R. 100.5(e)(3) (definition).

[12] Because the new base limits eliminated the conduit-contribution concern and mechanism on which this Court justified the "ceiling," the "ceiling" no longer served any permissible purpose. Yet it remained.

contributions to political parties (or PACs) trigger that "massive"-conduit-contribution risk. *Id.* at 38. Thus, Congress's limits on contributions to and by these entities were the level at which Congress *asserted* its anti-corruption interest and conduit-contribution concern. In other words, these limits fix the "huge" and "massive" contribution problems that *Buckley* identified. This leaves no justification for aggregate limits to purportedly fix these same problems.

Furthermore, FEC cannot meets its burden to prove a conduit-contribution mechanism by relying on transfers.[13] When Congress fixed the conduit-contribution problem, it expressly exempted "transfers" from its new contribution limits: "The limitations on contributions . . . do not apply to transfers between and among political parties which are national, State, district, or local committees . . . of the political party." 2 U.S.C. 441a(a)(4). *See* MB-App. 4a. Thus, Congress perceives *no* conduit-contribution risk in transfers between federal committees of the same political party—or of any affiliated committees. 11 C.F.R. 110.3(c)(1). So Congress asserted no conduit-contribution (or other) concern regarding these transfers. This is logical because hard money does not raise the concerns Congress identified with soft money: "[P]rohibiting parties from donating funds already raised in compliance with FECA does little to further Congress' goal of preventing corruption or the appearance of corruption of federal can-

---

[13] Unlimited funds may be transferred between political parties, from candidates to political parties, and between affiliated committees ("transfers" are not included within the "contribution" definition). *See* 11 C.F.R. 110.3(c). The lower court relied on transfers for its hypothetical mechanism. JS-App.12a.

didates and officeholders." *McConnell v. FEC*, 540 U.S. 93, 179 (2003). "We have found no evidence that Congress was concerned about . . . money . . . regulated by FECA." *Id.* at 180. Congress having asserted no interest regarding transfers, FEC may not now claim that transfers raise corruption or conduit-contribution concerns.

Thus, two of the factors key to *Buckley*'s conduit-contribution mechanism were eliminated by these new limits—(1) the ability to give a "huge contribution to a political party committee (or PAC) and thereby (2) the ability to trigger a "massive" conduit-contribution to a particular, intended candidate.

Congress also eliminated the third factor in *Buckley*'s mechanism—*political-committee proliferation*. The 1976 Conference Report described the new anti-circumvention, anti-proliferation rules as follows:

> The anti-proliferation rules . . . are intended to prevent . . . persons or groups . . . from *evading the contribution limits* . . . . Such rules are described as follows:
>
> 1. All . . . political committees set up by a single corporation and its subsidiaries are treated as a single political committee.
>
> 2. All . . . political committees set up by a single international union and its local unions are treated as a single political committee.
>
> 3. All . . . political committees set up by the AFL-CIO and all its State and local central bodies are treated as a single political committee.
>
> 4. All . . . political committees established by the Chamber of Commerce and its State and

> local Chambers are treated as a single political committee.
>
> 5. The anti-proliferation rules stated also apply in the case of multiple committees established by a group of persons.

H.R. Rep. No. 94-1057, at 58 (1976) (emphasis added).[14]

In 1980, Congress did two further things related to *Buckley*'s analysis. It barred "personal use" of candidate campaign funds *and* expressly authorized candidate "transfers without limitation to any . . . political party." Pub. L. 96-187, § 113, 93 Stat. 1339. When this Court decided *Buckley*, candidates could use contributions "for any . . . lawful purpose," 424 U.S. at 179, including *personal* use. That is now impossible, reducing any quid-pro-quo risk. 11 C.F.R. 113.1(g), 113.2 (defining and barring "personal use").[15] Permitting unlimited candidate transfers to political parties means that Congress perceives, and asserts, *no* conduit-contribution or other risk in such transfers.

Because this Court upheld one of Congress's post-*Buckley* cures for the conduit-contribution risk and mechanism, those cures remain in place and effective. The $5,000/year limit on contributions *to* a PAC was upheld in *California Medical Association v. FEC*, 453 U.S. 182 (1981) ("*Cal. Med.*"), based on a conduit-con-

---

[14] Affiliated committees share a contribution limit, and FEC may consider *numerous* factors to identify affiliation. 11 C.F.R. 100.5(g), 110.3(a). *See* MB-App. 8a-9a.

[15] *Cf. FEC v. Craig*, No. 12-0958, 2013 WL 1248271, (D.D.C. Mar. 28, 2013) (re impermissible use of campaign funds by former Sen. Craig for legal defense unrelated to official duties).

tribution risk. *Id.* at 197-99 (plurality); *id.* at 203 (Blackmun, J., concurring in part and in judgment).[16] The plurality recited legislative history declaring that the 1976 amendments were to eliminate circumvention and political-committee proliferation:

> The Conference Report . . . specifically notes:
>
> > "The conferees' decision to impose more precisely defined limitations on the amount an individual may contribute to a political committee . . . and to impose new limits on the amount a person or multicandidate committee may contribute to a political committee . . . is predicated on the following considerations: first, these limits *restrict the opportunity to circumvent* the $1,000 and $5,000 limits on contributions to a candidate; second, these limits serve to assure that candidates' reports *reveal the root source* of the contributions the candidate has received; and third, these limitations *minimize* the adverse im-

---

[16] CMA argued that contributors should be able to make unlimited contributions to multicandidate PACs, to which the plurality replied that eliminating the base limit would reinstate *Buckley*'s conduit-contribution risk, including evasion of the $25,000-ceiling, "since such committees are not limited in the aggregate amount they may contribute in any year. These concerns prompted Congress to enact § 441a(a)(1)(C) . . . to protect the integrity of the contribution restrictions upheld . . . in *Buckley*." *Cal. Med.*, 453 U.S. at 197-99 (plurality). The plurality's comment in *Cal. Med.* about the "ceiling" does not control here because it is not a court opinion, it does not deal with the new aggregate limits, and the ceiling's constitutionality was not at issue. Vitally, because the Court *upheld the PAC base limit*, *Buckley*'s conduit-contribution mechanism remains eliminated.

> pact on the statutory scheme caused by *political committees that appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign.*"

Cal. Med., 453 U.S. at 198 n.18 (emphasis added; citation omitted).

In sum, Congress eliminated the conduit-contribution mechanism that *Buckley* posited to uphold the "ceiling."Congress having fixed *Buckley*'s conduit-contribution concern and mechanism—which this Court deemed the justification for the old "ceiling"—that "ceiling" is no longer justified, nor is any other aggregate limit on an individual's total contributions.

C. In BCRA, Congress Repealed and Replaced the "Ceiling" with Multiple Aggregate limits.

In BCRA § 307(b), 116 Stat. 102-03, Congress repealed and replaced the "ceiling" with multiple aggregate limits. *See* MB-App. 18a. But the new aggregate limits are no more justified now than the "ceiling."

D. The $74,600 Aggregate Limit Lacks a Cognizable Interest as Applied to National Party Committees.

The aggregate limit on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), is unconstitutional as applied to national party committees. The aggregate limit serves no permissible purpose. Lacking such a purpose, it is not properly tailored (neither closely nor narrowly) to a cognizable interest (neither sufficiently important nor compelling).

1. The Anti-Corruption Interest Is Not Directly Implicated.

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. National Conservative PAC*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). "Corruption" is limited: "Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 497. *Citizens United* again limited "corruption" to quid-pro-quo corruption, rejecting influence, access, gratitude, and leveling-the-playing-field as cognizable corruption. 130 S. Ct. at 909-12.

However, the anti-*corruption* interest is not directly implicated with contributions to national party committees because it "is implicated by contributions to *candidates*."*EMILY's List v. FEC*, 581 F.3d 1, 6 (D.C. Cir. 2009)) (emphasis in original). Cognizable quid-pro-quo corruption is based on a *financial* benefit to a *particular* candidate in such a "large" amount, *Buckley*, 424 U.S. at 26, as to cause a candidate "to act contrary to [the candidate's] obligations of office," *NCPAC*, 470 U.S. at 497. Only if a large contribution is actually *received* by a particular candidate is the quid-pro-quo risk directly implicated.

Because the anti-corruption interest is not directly implicated with aggregate limits, *Buckley* required that the government show a mechanism explaining how a conduit-contribution could actually *get* to a particular, intended candidate. This Court required that conduit-contribution mechanism to justify the aggre-

gate "ceiling," 424 U.S. at 38, not the anti-corruption interest applicable to base limits, *id.* at 26.

Furthermore, national party committees pose no inherent quid-pro-quo risk to their candidates. *See Colorado-I*, 518 U.S. at 616 ("Breyer, J., joined by O'Connor & Souter, JJ.) ("We are not aware of any special dangers of corruption associated with political parties . . . ."); *id.* at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment and dissenting in part).[17] Thus, just as in *Colorado-I*, where an anti-corruption interest could not be used as a basis to prohibit political party committee independent expenditures, here it cannot be used to limit contributions to national party committees because there is no quid-pro-quo risk. *See also Colorado-II*, 533 U.S. at 456 (relying on anti-*circumvention* concern in upholding limit on party expenditures coordinated with candidates).

2. No Conduit-Contribution Concern Exists.

Under this Court's analysis in *Buckley*, FEC must prove a specific *mechanism* by which the *conduit-con-*

---

[17]

> As applied in the specific context of campaign funding by political parties, the anti-corruption rationale loses its force. . . . What could it mean for a party to "corrupt" its candidate or to exercise "coercive" influence over him? The very aim of a political party is to influence its candidate's stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute "a subversion of the political process."

Id. at 646 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in judgment and dissenting in part) (citations omitted).

tribution risk might arise. FEC has proven none. There is none.

This Court recognized that Congress may take *prophylactic* measures to prevent *circumvention* of the contribution limits that eliminate the quid-pro-quo risk.[18] But the anti-circumvention interest does not justify the $74,600 aggregate limit as applied to contributions to national party committees.

(a) The Government's Ability to Assert a Conduit-Contribution Concern Is Limited in Scope.

Just as cognizable *corruption* is strictly limited, *see Citizens United*, 130 S. Ct. at 909-10, cognizable *circumvention*, i.e., a conduit-contribution risk, is also limited—in four ways.

First, because the government's ability to prevent a conduit-contribution risk is derivative and prophylactic, there must first be a cognizable, *underlying quid-pro-quo risk*. Since *Buckley* held that only "large contributions" trigger a quid-pro-quo risk, 424 U.S. at 26, any conduit-contribution mechanism must allow an individual to get a "*large*" conduit contribution to a particular, intended candidate (without any sort of earmarking) in order to trigger a risk. This Court recognized this requirement by requiring that a conduit-contribution mechanism allow an individual to "contribute *massive* amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or

---

[18] The base limits are themselves "preventative," *Citizens United*, 130 S. Ct. at 908, as are limits on contributions *by* political party committees, PACs, and candidate committees, making aggregate limits a prophylaxis-on-prophylaxis.

huge contributions to the candidate's political party," *id.* at 38 (emphasis added).

Given the requirement of massive contributions for a cognizable conduit-contribution concern, the tiny percent of a contribution by a national party committee to a candidate that might be deemed attributable on a prorated basis to the contributor of an unearmarked, base-level amount to the national party committee would not be cognizable as a conduit-contribution. If an individual gave $1,000 to a national party committee that received $1,000,000, her share of the million would be 0.1%. If that committee contributes $5,000 to a candidate, then a prorated portion of that contribution might be deemed attributable to that individual. Multiplying $5,000 by 0.1%, reveals that $5 might be deemed attributable to that individual. But that prorated amount is not cognizable for a conduit-contribution analysis for two reasons: (a) it is neither "large" nor "massive" and so cannot trigger the quid-pro-quo risk and (b) it is at a level approved by Congress when Congress set limits on contributions *to* national party committees and on contributions *by* national party committees. So such a prorated share of a contribution to a candidate resulting from activity within the limits set by Congress raises neither a quid-pro-quo interest nor a conduit-contribution concern.

Moreover, no underlying interest in preventing quid-pro-quo corruption would be triggered if an unearmarked conduit-contribution could not be clearly *attributed* to a particular individual intending to benefit a particular candidate, because otherwise there would be no underlying quid-pro-quo risk. Such "attribution" occurs when there is earmarking (which is broadly defined, *see infra* at 38-40), but it does not occur where

there is a mere assignment of credit, e.g., a "tallying" system.[19] This is clear from FEC's recent decision in Matter Under Review ("MUR") 3620 (Democratic Senatorial Campaign Committee ("DSCC")),[20] wherein FEC made clear that absent earmarking (a) a national party committee may do what it wants with contributions to it that are tallied to the credit of a particular candidate, (b) that such tallied contributions are not implicitly earmarked, and (c) that tallied contributions do not trigger a quid-pro-quo or conduit-contribution risk. *See infra* at 41-42 (discussing MUR 3620).

Second, the government must prove that "harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994) (citation omitted). So any suggested conduit-contribution mechanism and underlying quid-pro-quo risk must be *proven*, not based on speculation.

Third, just as "[r]eliance on a 'generic favoritism or influence theory . . . is at odds with . . . First Amendment analyses because it is unbounded and susceptible to no limiting principle,'" *Citizens United*, 130 S. Ct. at 910 (citation omitted), so there can be no generic "circumvention" theory lacking a "limiting principle."

Fourth, while true circumvention cannot be based on citizens changing from now-barred political activity to yet-legal activity, such avoidance (not evasion) can be a reason to *overturn* restrictions, not multiply them:

---

[19] The lower court cited a tallying scheme for its assertion that "it is not hard to imagine a situation where parties implicitly agree [to serve as conduits]." JS-App. 12a.

[20] *Available through* http://fec.gov/em/mur.shtml.

> Political speech is so ingrained in our culture that speakers find ways to *circumvent* campaign finance laws. See, e.g., *McConnell*[, 540 U.S. at] 176-177 ("Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives . . . to exploit [26 U.S.C. 527] organizations will only increase[.]"). Our Nation's speech dynamic is changing, and informative voices should not have to *circumvent* onerous restrictions to exercise their First Amendment rights.

Citizens United, 130 S. Ct. at 912 (emphasis added). So if would-be contributors to national party committees are restricted by aggregate limits and instead give to super-PACs,[21] that kind of "circumvention" requires careful examination of whether the aggregate limits are constitutionally justified.[22]

Even where there *is* a conduit-contribution risk, "Congress may not choose an unconstitutional remedy." *Citizens United*, 130 S. Ct. at 911. If the ability to move "massive" unearmarked conduit-contributions to a particular candidate is already eliminated by post-*Buckley* amendments, there remains no justification for additional prophylaxes. This is clear from the prohibition on layering "prophylaxis-upon-prophylaxis" ar-

---

[21] *See, e.g.*, Anupama Narayanswamy, *Presidential campaign donors moving to super PACs*, Sunlight Reporting Group, Apr. 26, 2012, http://reporting.sunlightfoundation.com/2012/maxed-out-donors/.

[22] *Buckley* applied this "circumvention" principle in rejecting an independent-expenditure limit. 424 U.S. at 45-47. "Rather than preventing circumvention of the contribution limitations, [the limit] severely restricts all independent advocacy despite its substantially diminished potential for abuse." *Id.* at 47.

ticulated in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 479 (2007) ("*WRTL-II*") (Roberts, C.J., joined by Alito, J.) (controlling opinion). *WRTL-II* rejected the argument "that an expansive definition of 'functional equivalent' [wa]s needed to ensure that issue advocacy does not circumvent the rule against express advocacy, which in turn helps protect against circumvention of the rule against contributions." *Id.* at 479. *WRTL-II* held that the "prophylaxis-upon-prophylaxis approach" . . . is not consistent with strict scrutiny." *Id.*

Nor is layering prophylaxes consistent with the exacting scrutiny *tailoring* requirement that any contribution "limitation [be] no broader than necessary to achieve th[e governmental] interest," *Cal. Med.*, 453 U.S. at 203 (Blackmun, J., concurring in part and in judgment) (controlling opinion), or that the government "avoid unnecessary abridgement of associational freedoms," *Buckley*, 424 U.S. at 25. An aggregate limit is inadequately tailored and too broad if a base limit eliminates conduit-contribution risks.

(b) *Buckley* Requires Examination of the Potential for Political-Committee Proliferation, "Huge" Contributions, and Conduit-Capability.

Applying these principles limiting a cognizable conduit-contribution risk and remedy, we return to whether a conduit-contribution concern justifies the $74,600 aggregate limit as applied to national party committees.[23]

---

[23] Congress saw political parties as posing little conduit-contribution risk because it created a higher limit on contributions to them and gave them extra spending authority. *See* MB-App. 17a.

This requires returning to *Buckley*'s analysis in facially upholding the old "ceiling." *See supra* at 15-18. This Court's analysis pointed to a conduit-contribution mechanism. Employing that analysis in searching for a conduit-contribution mechanism here, *as applied to national party committees*, *Buckley*'s analysis requires consideration of three questions:

- Is *political-committee proliferation* by national party committees possible?
- Can a "*huge* contribution" be made to a national party committee?
- Can a national party committee be a vehicle for a "*massive*" conduit-contribution to a particular candidate?[24]

(c) Congress Imposed a *Political-Committee Proliferation* Prophylaxis.

Beginning with *Buckley*'s concern about political-committee proliferation, is it possible to make a "massive" conduit-contribution to a candidate through a *proliferation* of political committees by the same persons? No. *Buckley*'s specific concern was with a proliferation of *PACs*, *see* 424 U.S. at 28 n.31, but the 1976 FECA amendments eliminated all political-committee proliferation by the same entities. FEC has detailed "affiliation" rules preventing this proliferation. 11 C.F.R. 100.5(g).[25]

---

[24] Only arguments applicable to national party committees are relevant to this *as-applied* challenge (though Congress fixed *Buckley*'s concerns broadly). So, e.g., an argument that there are now more PACs is irrelevant here.

[25] The "affiliated committee" definition establishes which committees "shar[e] a single contribution limitation."

(continued...)

As relevant here, national party committees of the same political party are not affiliated, 11 C.F.R. 100.5(g)(3)(iv), but only three Congress-approved national party committees are permitted per national political party—a national committee, a Senate campaign committee, and a House campaign committee, 11 C.F.R. 110.3(b)(1)-(2). Congress gave them separate limits on contributions received and made.[26] And Congress expressly declined to limit transfers between them—indicating Congress's judgment that national party committees pose no cognizable corruption or conduit-contribution risk based on these hard-money limits. RNC, NRSC, and NRCC are, *in fact*, separate legal entities with separate histories, governing bodies, and focuses. Verified Complaint ("VC–") ¶¶ 43-58. They have their own agendas, e.g., RNC focuses primarily on presidential elections and party matters, NRSC focuses on electing Republican senators, and NRCC focuses on electing Republican representatives. VC–¶¶ 43-46. So there is no reason to treat them as one for the $74,600 aggregate limit.

---

[25] (...continued)
11 C.F.R. 100.5(g)(3). All committees run by the same entities are "affiliated." *Id.* FEC broadly defines factors it considers in determining "affiliation," including formal and informal control, control over employees, overlapping membership, overlapping officers or employees, funding relationships, founding relationships, and patterns of contributions and contributors. 11 C.F.R. 100.5(g)(4). *See* MB-App. 7a-9a. *See also* 11 C.F.R. 110.3(a) (same factors).

[26] National party committees have Congress-approved separate limits on contributions, e.g., each may receive $32,400/year from an individual and each may contribute $5,000/election to a candidate. MB-App. 17a.

In sum, it is now impossible to move massive conduit-contributions to candidates through a *proliferation* of political committees created by the same persons, and there are only three, unique national party committees per political party—all expressly approved by Congress.

(d) Congress Imposed a *Huge-Contribution* Prophylaxis.

Turning to *Buckley*'s conduit-contribution concern about "huge" contributions to national party committees, is it possible now for an individual to make a "*huge* contribution[]" to a national party committee? *Buckley*, 424 U.S. at 38 (emphasis added). No. Nor is it possible to make a "huge" contribution to any political party committee or PAC (that makes contributions). While the system that *Buckley* considered had no base limits on contributions *to* political parties and PACs (other than the "ceiling"), those now exist. *See* MB-App. 18a. Thus, *Buckley*'s conduit-contribution mechanism no longer functions.

Individuals may currently give $32,400/year to a national party committee, $10,000/year to a state party committee (combined), $5,000/year to a PAC, and $2,600/election to a candidate. *Id.* None of these is "huge," per year or biennium.[27]

Moreover, failure of Congress to properly adjust limits for inflation means that any quid-pro-quo or con-

---

[27] *Buckley* did not consider the $25,000 "ceiling" huge, because the Court said it *prevented* "huge" contributions. That $25,000 (in 1974) is worth $118,039 now. *See* www.bls.gov/data/inflation_calculator.htm. But the present aggregate limit on contributions to all non-candidate committees is only $74,600.

duit-contribution risk has *decreased* since the 1974 FECA scheme. Failure to inflation-adjust limits is a "danger sign" requiring careful scrutiny as to tailoring. *Randall*, 548 U.S. at 252-53 (plurality). The inflation calculator provides current equivalents for the permissible 1974 contribution-limits. The $1,000 limit on a person's contributions to candidates upheld in *Buckley*, 424 U.S. at 23-35, is now worth $4,722, not the current $2,600. The $5,000 limit on a political committee's contributions to candidates upheld in *Buckley*, *id.* at 35-37, is now worth $23,608, not the current $5,000. Using 1974 dollar values in a typical election cycle with primary and general elections, an individual should be able to contribute $9,444 to a candidate, not $5,200, and a political party committee or multicandidate PAC should be able to contribute $47,216 to a candidate, not $10,000. Though Congress found no corruption or conduit-contribution risk below these inflation-adjusted amounts, it failed to properly adjust the limits for inflation, thereby layering on yet another prophylaxis affecting the conduit-contribution analysis. For example, even if a contributor could somehow use a national party committee as a conduit for a $5,000 contribution to a candidate, the actual level at which Congress asserted a conduit-corruption risk is now worth $23,608.

And turning specifically to national party committees, we again see that the failure to inflation-adjust limits has decreased any conduit-contribution risk since 1976. The 1976 FECA amendments established a $20,000 base limit for an individual's contribution to a national party committee. *See supra* at 19. In 2002, BCRA increased this to $25,000. 2 U.S.C. 441a(a)(1)(B). But inflation-adjusted from 1976 to 2002, that should have been $63,234. *See* http://www. bls.gov/data/inflation_calculator.htm. Inflation adjustments *since*

2002 do not fix this problem; properly adjusted *since 1976*, this base limit should now be $81,818, not $32,400. *Id.* Since base limits on contributions to non-candidate committees are based on a conduit-contribution concern, the base limits are far below those at which Congress asserted its concern in 1976. Any conduit-contribution risk from base-level contributions has proportionately diminished.

Congress made the judgment that each base limit strikes the right balance in eliminating any *cognizable* conduit-contribution and corruption risk as to the entity to which the limit applies. *See supra* at 21, 23 (Conference Committee Report). So a $32,400/year limit on contributions to RNC, coupled with limits on contributions and coordinated expenditures by RNC, eliminates any cognizable conduit-contribution risk as to a contribution to RNC. Doing something posing zero *cognizable* risk multiple times does not increase the risk. Zero multiplied by anything equals zero. Thus, there is no conduit-contribution justification for an aggregate limit. If there is no conduit-contribution risk in giving $32,400/year to RNC, NRSC, or NRCC, there is no such risk in giving that to all of them in a year, or to each per year per biennium.

In BCRA, Congress instituted yet another prophylaxis against giving "huge" amounts *to* political committees in the form of "soft money." This prophylaxis was a total ban, upheld in *McConnell*:

> The question for present purposes is whether large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption. Both common sense and the ample record in these cases confirm Congress' belief that they do. . . . FEC's

> allocation regime has invited widespread circumvention of FECA's limits on contributions to parties for the purpose of influencing federal elections.

540 U.S. at 145.[28] This was so, the Court said, because "[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." *Id.* The "circumvention" mentioned here had nothing to do with the conduit-contribution mechanism of *Buckley*. 424 U.S. at 38. Rather, the described "circumvention" mechanism was through broadly defined "corruption" (and its appearance), not conduit-contributions reaching candidates. *Citizens United* rejected this equation of corruption with influence, access, or gratitude. 130 S. Ct. at 909-10. Nonetheless, Congress's ban on soft-money contributions remains in effect, providing another prophylaxis preventing the movement of "huge" amounts to political party committees.

In sum, *Buckley*'s conduit-contribution concern was based on the movement of "massive" conduit-contributions to a particular candidate by means of a "huge" unearmarked contribution to a political party (or PAC). 424 U.S. at 38. That is now impossible.

(e) Congress Imposed an *Anti-Conduit* Prophylaxis by Many Prophylaxes.

Buckley's conduit-contribution mechanism dealt with whether political party committees could *be con-*

---

[28] Some of the perceived problem with soft money was Congress's failure to adjust hard money contribution limits for inflation. A $20,000 hard money contribution plus a $40,000 soft money contribution to RNC in 2001, totaling $60,000, would have been well within a properly inflation-adjusted *hard* money limit. *See supra* at 35.

duits for "massive" contributions to a particular, intended candidate. That is now impossible, which is clear from the elimination of "huge" contributions to political party committees and of political-committee proliferation. *See supra* Part II(B). It is further clear that Congress imposed a general conduit-contribution prophylaxis from the following layers of prophylaxes. As a result, conduit-contributions are impossible now.

One prophylaxis is a base limit on a contribution to a candidate. That base limit—aimed at the underlying quid-pro-quo risk— is "preventative." *Citizens United*, 130 S. Ct. at 908. There is no inherent wrong in a large contribution to a candidate. Rather, the giving of financial quids for political quos is wrong: "The hallmark of corruption is the financial quid pro quo: dollars for political favors." *NCPAC*, 470 U.S. at 497.

That base-limit prophylaxis is layered atop two other prophylaxes, discussed in *Buckley*, designed to eliminate quid-pro-quo corruption, i.e., laws criminalizing *bribery* and requiring contribution *disclosure*. *See* 424 U.S. at 27-28. *Buckley* decided that the challenged base limit was justified as an additional prophylaxis because "laws making [bribes] criminal . . . deal with only the most blatant and specific attempts of those with money to influence governmental action." *Id.*

And there are other prophylaxes. One prohibits *false-name contributions*—making or accepting contributions other than in the name of the true contributor. 2 U.S.C. 441f. *See* MB-App. 6a. This includes "assist-[ing]" another in making such a contribution and simply not "disclosing the source of the money." 11 C.F.R. 110.4(b). *See* MB-App. 10a. Contributions to a candidate through another entity must be done in one's own

name and subject to one's own limit or the contribution is illegal and subject to stiff penalties.

Another prophylaxis involves *earmarking* laws. Earmarked contributions through an intermediary are deemed contributions from the original contributor, subject to that contributor's limit and to disclosure. 2 U.S.C. 441a(a)(8). *See* MB-App. 6a.

> All contributions by a person made on behalf of or to a candidate, including contributions which are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit, are contributions from the person to the candidate.

11 C.F.R. 110.6(a). *See* MB-App. 12a. And "earmarked" sweeps broadly:

> *[E]armarked* means a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.

11 C.F.R. 110.6(b)(1). *See* MB-App. 12a.[29]

---

[29] FEC further expands the reach of the earmarking rule as follows:

> A contribution received by a party committee may count against the contributor's contribution limit for a particular candidate if:
>
> - The contributor knows that a substantial portion of his or her contribution will be given to or spent on behalf of a particular candidate; or
> - The contributor retains control over the funds

(continued...)

Thus, any conduit-contribution mechanism advanced to justify aggregate limits may not assume some "agreement" or "understanding" as the mechanism to get a conduit-contribution through a political committee to a candidate *unless* all parties involved scrupulously complied with the "conduit or intermediary" requirements of contribution limits and reporting at 11 C.F.R. 110.6. Otherwise the attempted conduit contribution is illegal. *Buckley*'s mechanism was based on "unearmarked" contributions, so any attempt to show a mechanism now must assume non-earmarking (but full compliance with the law).

From the foregoing, it is clear that *unearmarked* contributions do not include wink-and-nod arrangements, and that the "huge" contributions essential to *Buckley*'s mechanism are prohibited. But there is also an analytical problem for any suggested conduit-contribution mechanism based on *truly* unearmarked contributions: can an unearmarked contribution actually pose a conduit-contribution risk?

Without earmarking, a national party committee *might* decide to contribute the now-permissible $5,000 to a candidate, but it might not. Without earmarking,

---

[29] (...continued)

> after making the contribution (for example, the contributor earmarks the contribution for a particular candidate). [11 C.F.R.]110.1(h), 110.2(h) and 110.6.

FEC, *Political Party Committees* at 15 (2009). "On behalf of" here means something like paying a candidate's bills, not making independent expenditures supporting a candidate, because unlimited contributions to super-PACs *may* be earmarked for particular independent expenditures. *See* FEC, Advisory Opinion 2010-09 (Club for Growth) at 5.

there is no way to *assure* that any of an individual's contribution to a national party committee will ever make it to a particular candidate as a contribution. A political party committee is free to do with the money as it wishes. National party committees have many demands on their funds. The odds that any funds from an unearmarked contribution might flow to a particular candidate are so low as to be noncognizable—even setting aside the fact that unearmarked funds, pooled with millions of dollars from myriad contributors, become fungible.

FEC has recently confirmed that *unearmarked* contributions do not bind a national party committee in any way and that the presence of a tally system neither alters the committee's spending liberty nor creates any conduit-contribution concern.[30] In 2012, FEC lifted the requirements of a settlement agreement on DSCC arising from a complaint that it was accepting contributions that were really earmarked, though it was not treating them as such.[31] Included in the complaint was the fact that DSCC had a tally system whereby contributions to DSCC were being tallied for certain candidates, who would then be favored if DSCC decided that the candidate's campaign would receive financial support. FEC permitted such a tally system so long as DSCC included the following notice on its solicitations:

> The DSCC does not accept contributions earmarked for a particular candidate. Contributions tallied for a particular candidate will be

---

[30] The lower court cited a tally system as support for its hypothetical circumvention mechanism. JS-App. 12a.

[31] *See* FEC, MUR 3620 (DSCC), *available through* http://fec.gov/em/mur.shtml, and accompanying documents.

> spent for DSCC activities and programs as the Committee determines within its sole discretion.

DSCC recently asked to have the notice requirement lifted, and FEC agreed. For present purposes, this FEC concession establishes that contributions to a national party committee are not cognizable as conduit-contributions *absent formal earmarking*, even where a tally system lets the candidate know that the individual made a contribution that the individual wanted credited to that candidate.

If this as-applied challenge succeeds, what could an individual contribute per biennium under 2 U.S.C. 441a(a)(3)(B)?[32] An individual could give $194,400 to national party committees, plus $48,600 to state party committees and PACs.[33] These are not "huge" contributions, and an individual's prorated shares of contributions to and by these entities are not cognizable circumvention because Congress approved these limits. Thus, *Buckley*'s "massive"-contribution-conduit concern is eliminated by, inter alia, the $32,400/year base limit on contributions to national party committees, the $5,000/election limit on contributions by a national party committee to a candidate, and the coordinated-

---

[32] An individual also has a $48,600 aggregate limit for contributions to candidates. *See* MB-App. 18a. Congress bifurcated the limits, so it is not relevant here.

[33] The lower court claims that—absent *all* aggregate limits—"an individual might contribute $3.5 million to one party and its affiliated committees in a single election cycle." JS-App. 3a n.1. But under this *as-applied challenge*, and if this Court decides that the $48,600 limit on contributions to non-national party committees is severable, *see* Part V, an individual could contribute the stated $194,400 + $48,600.

expenditure Party Expenditure Provision limits. *See* MB-App. 17a.[34]

From this review of *Buckley*'s conduit-contribution concerns as applied, it is clear that Congress has created prophylaxes on prophylaxes eliminating *Buckley*'s concerns. The 1976 Conference Report specifically said that Congress was amending FECA to eliminate these concerns. *See supra* at 21, 23. Because *Buckley*'s conduit-contribution concern is already amply addressed *without* the aggregate limits, there remains no justification for the $74,600 aggregate limit on contributions as applied to national party committees. Congress is layering prophylaxes in a manner broader than necessary.

In sum, the $74,600 aggregate limit is supported by neither a justifying interest nor proper tailoring, under strict or exacting scrutiny, as applied to national party-committees.[35]

---

[34] The Party Expenditure Provision limits were *upheld* in *Colorado-II*, because political parties "act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452. This reiterated *Buckley*'s concern about political parties serving as conduits for circumventing contribution limits. (The dissent disputed that the evidence showed any corruption or circumvention concern. *Id.* at 475-80.) But, the Court added, "[i]t is this party role . . . that the Party Expenditure Provision *targets*." *Id.* at 452 (emphasis added). This *targeting* by Congress was its circumvention cure. It was the level at which Congress perceived a potential problem and asserted an interest.

[35] Congress's assertion of an anti-circumvention interest is also underinclusive because PACs' contributions candidates are not subject to an aggregate limit. Multicandidate

(continued...)

3. The Aggregate Limit Relies on an Unconstitutional Equalizing Interest.

Because the aggregate limit is not justified by a conduit-contribution concern, it serves only to limit persons who could contribute $194,400 to three national party committees to giving just $74,600. FEC asserts an equalizing interest by declaring that "the aggregate limits serve to 'curtail the influence of excessive political contributions by any single person.'" Mot. Dismiss or Affirm at 2 (quoting 120 Cong. Rec. 27,224 (1974) (Statement of Rep. Brademas)). This is unsurprising because in *Buckley* the government also asserted an interest in "mut[ing] the voices of affluent persons . . . and thereby . . . equaliz[ing] the . . . ability . . . to affect . . . elections." 424 U.S. at 25-26. But *Buckley* rejected an equalizing interest, *id.* at 48-49, 54, 57, as did *Citizens United*, 130 S. Ct. at 904, 910. FEC cannot meet its burden with forbidden interests.

4. The Lower Court's Posited Conduit-Contribution Mechanism Fails Scrutiny.

Given the foregoing, the lower court's proposed conduit-contribution mechanism, JS-App. 12a, fails scrutiny.

Buckley requires a specific, cognizable *mechanism* by which an individual's unearmarked contribution results in a cognizable conduit-contribution to a particular, intended (but unspecified) candidate, through a

---

[35] (...continued)
PACs, as deeply interested in legislative outcomes as individuals, may contribute $5,000 to as many candidates as they can afford. *Cf. Republican Party of Minnesota v. White*, 536 U.S. 765, 780 (2002) ("As a means of pursuing the [articulated] objective . . . , the [provision] is so . . . underinclusive" it is not credible.).

national party committee (absent the aggregate limit). 424 U.S. at 38 (positing conduit-contribution mechanism). And the mechanism must be based on the function of the aggregate limit *itself*, just as in *Buckley* the mechanism was based on base-limit gaps that the "ceiling" closed.

Moreover, the lower court's hypothetical mechanism must comport with the governing principles:

- the government's duty to prove interests with evidence, not speculation, *see supra* at 29;
- the assumption that individuals, political party committees, and candidates *obey* the law;
- the ban on giving, receiving, or assisting contributions in the name of another, *see supra* at 38;
- the broad definition of "earmarking" (catching implicit understandings) and the ban on earmarking absent compliance with contribution limits and reporting requirements, *see supra* at 38-39;
- elimination of political-committee proliferation by the same persons and Congress's authorization of three national party committees per political party, *see supra* at 32-34
- the base limit eliminating the possibility of a "huge" contribution by an individual to a national party committee—set at the level at which Congress perceived, and asserted, a conduit-contribution concern, *see supra* at 21, 23 (Conference Committee Report);
- congressionally established limits on national party committee contributions to, and coordinated expenditures with, candidates—which "target" circumvention at the level at which Congress perceived, and asserted, a conduit-contribution concern, *see*

See Colorado-II, 533 U.S. at 452 (Party Expenditure Provision limit "targets" circumvention interest);

- Congress's express exemption of political party transfers and candidate-to-political party transfers from the contribution limits, thereby asserting no conduit-contribution concern, *see supra* at 20; and
- the fact that, absent earmarking, there is no reliable way for a contributor to assure that a national party committee will contribute to, or coordinate expenditures with, any particular candidate or at any particular level, *see supra* at 40-42.

The hypothetical mechanism underlying the lower court's decision has four elements:

(1) "an individual . . . give[s] half-a-million dollars in a single check to a joint fundraising committee comprising a party's presidential candidate, . . . national party committee, and most of the party's state party committees";

(2) these committees *might* "transfer" funds, so "the . . . contribution *might* . . . find its way to a single committee[]," which "*might* use the money for coordinated expenditures";

(3) the benefitted "candidate . . . knows the coordinated expenditure derives from that . . . check . . . [and] will know precisely where to lay the wreath of gratitude," though "[g]ratitude . . . is not . . . a constitutionally-cognizable form of corruption"; and

(4) though "it may seem *unlikely* that so many entities would willingly serve as conduits for a single contributor's interests[,] . . . it is not hard to *imagine* a situation where the parties implicitly agree to such a system." JS-App. 12a (emphasis added).

Considering these four elements in light of the foregoing principles, reveals that the lower court's mechanism fails.

(1) In the first element, the half-million-dollar figure is erroneous for this *as-applied* challenge. If the $74,600 aggregate limit is struck as applied to national party committees, an individual could contribute $194,400/biennium (for three national party committees) plus $48,600 (for state party committees). *See supra* at 42. An individual may give a candidate only $2,600/election, potentially $5,200/biennium (with primary and general elections).[36] *Only* if the challenges in Parts III (facial) and IV (severability) succeed, could more be contributed to state party committees biennially. Furthermore, there is no evidence that state party committees have been willing to join a presidential committee in a joint fundraising effort and then transfer all theirs receipts to a national party committee.

Moreover, joint-fundraising contributions are hard money, for which Congress has *already* satisfied its conduit-contribution concern. FEC's joint-fundraising regulation requires compliance with all applicable source-and-amount restrictions (and imposes considerable administrative burdens). *See* 11 C.F.R. 102.17. So a *single* check is immaterial, as is an allegedly *large* check—these arguments are based on a forbidden equalizing interest. And if Congress perceives problems with joint fundraisers, that is a separate issue that Congress can fix—without burdening individuals' First Amendment rights with aggregate limits.

---

[36] Contributions to candidates are presumed for the *next* election, unless otherwise designated in writing; contributions designated for past-elections can only retire debts. 11 C.F.R. 110.1(b).

(2) In the second element, the lower court's repetition of "*might*" is impermissible speculation. Where First Amendment rights are involved, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural . . . ." *Turner Broadcasting Sys.*, 512 U.S. at 664 (internal citation omitted). This speculation is not even credible because it purportedly occurs despite: no earmarking (broadly defined); the ban on name-of-another contributions; and the fact that candidate committees and party committees have their own diverse and pressing needs for which they fundraise.

Congress perceived no problem with, and asserted no interest in restricting, *transfers*, so transfers may not now be asserted as justifying aggregate limits. When Congress asserted its conduit-contribution concern post-*Buckley* with new limits on contributions to and by committees—and on political committee proliferation—it *expressly excluded* hard-money "transfers." *See supra* at 20. And if transfers *were* a cognizable problem, that is a separate issue that Congress could address, not a reason to uphold aggregate limits. The limit on national party committee's coordinated expenditures *already* "targets" the conduit-contribution concern. *Colorado-II*, 533 U.S. at 452. That limit—with the limit on contributions to and by party committees—are Congress's cure for conduit-contributions. In analyzing a circumvention risk in *Colorado-II*, this Court made no mention of transfers, indicating that with the aforementioned limits in place, national party

committees were free to transfer funds without concern.[37, 38]

(3) In the third element, the lower court asserts that the benefitted "candidate . . . knows the coordinated expenditure derives from that . . . check . . . [and] will know precisely where to lay the wreath of gratitude," though "[g]ratitude . . . is not . . . a constitutionally-cognizable form of corruption."

As discussed regarding the DSCC tally system, *supra* at 41-42, mere knowledge of an individual contributor's preference is non-cognizable as a conduit-contribution concern absent earmarking. And the lower court may not assume sub-silentio earmarking unless it is willing to assume that an individual, state party com-

---

[37] Even the Democratic Party's tallying system, *Colorado-II*, 533 U.S. at 459-60, which was "legal," *id.* at 459 n.22, could function without posing a circumvention risk with the party coordinated expenditure limit in place. So the lower court's citation of the tally system, JS-App. 12a, was erroneous, especially since there is no evidence of such a system here.

Moreover, a tally-system argument is no longer viable after FEC's 2012 decision that the DSCC fulfilled conciliation-agreement obligations regarding its ongoing tallying system. *See supra* at 41-42. Tallying creates no cognizable conduit-contribution risk.

[38] At a minimum, FEC must prove that the *increment* between the $74,600 aggregate limit and the $194,400 that the base limit allows (to three national party committees per biennium), creates a conduit-contribution mechanism. FEC must do so based *either* on the premise that single-checks, transfers, and gratitude are not part of any cognizable mechanism, *see supra*, *or* on the proof that these somehow apply to the *increment* even though they do not apply to contributions under the $74,600 aggregate limit.

mittees, a national party committee, and a candidate are willing to violate a law with serious legal and reputation penalties—an erroneous assumption, both factually and legally. *See infra* at 50. Notably, the court does not assert that a *conduit-contribution* occurs in its mechanism—a fatal problem—citing, rather, forbidden *gratitude* "corruption." And, while acknowledging that it may *not* rely on gratitude, it *does*. *See* JS-App. 12a ("wreath of gratitude").

(4) With the fourth element, the court acknowledges the "unlikel[ihood] that so many entities would willingly serve as conduits for a single contributor's interests." But if they are "conduits" then the court is now implying an actual conduit-contribution, despite its prior reliance on "gratitude." If a conduit-contribution is alleged, then the question is whether political parties, a candidate, and an individual are "likely" to engage in illegal activity with serious reputation and legal penalties, i.e., whether they are willing to violate the bans on *making*, *assisting*, and *receiving* name-of-another contributions and on making earmarked contributions without proper reporting and compliance with contribution limits.

The court's solution to this *unlikely* scenario is that "it is not hard to *imagine* a situation where the parties *implicitly* agree to such a system." Such *speculation* has no place in First Amendment jurisprudence.

It *is* hard to imagine so many so willing to violate the law and risk serious consequences—which could doom their ability to pursue their political goals at all.[39] *Implicit* agreement *is* agreement. *Implicit* ear-

---

[39] Violators risk civil (greater of $10,000 or 200% of un-

(continued...)

marking *is* earmarking. *Implicit* contributions *are* contributions. *Implicitly* violating contribution limits and conduit-reporting laws *is* violating the law.

The court's mechanism assumes that multiple entities will violate existing laws designed to prevent the conduit-contribution it posits. Justifying one conduit-contribution law on the basis that persons will violate other conduit-contribution laws is erroneous. Otherwise, Congress could create *endless* prophylaxes on prophylaxes, with each new one purportedly justified by the *same* interest and *assuming violation* of all preceding laws. Proper analysis is premised on obedience, not disobedience. If people violate existing laws, the solution is *enforcement*, not creating new laws for presumed violators to also violate.

The court ignored the many prophylaxes in place—and their individual and cumulative effects—by "conceiv[ing] of the contribution limits as a coherent system rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis." JS-App. 13a. That is neither precise First Amendment analysis nor the way of *Buckley*, which considered each limit individually. 424 U.S. at 23-51. Nor was it the way of *Citizens United*, which systematically and carefully considered each proffered interest before striking down the corporate independent-expenditure ban. 130 S. Ct. at 909-11.[40]

---

[39] (...continued)
lawful contribution) and criminal penalties (up to $500,000 and 5 years in prison). 2 U.S.C. 437g.

[40] The amici curiae brief by NRSC and NRCC further demonstrates that joint fundraising committees are not a means of circumventing contribution limits.

In sum, the lower court's hypothetical mechanism fails.

III.

The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Facially Unconstitutional.

The $74,600 aggregate limit, 2 U.S.C. 441a(a)(3)(B), restricts contributions to all non-candidate committees. If the $74,600 limit is held unconstitutional as applied to the substantial contributions received by national party committees, *see* http://www.opensecrets.org/parties/, it is substantially overbroad and facially unconstitutional. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). So if the $48,600 sub-limit is struck, *see* Part IV, state, district, and localparty committees, as well as PACs, would not be bound by the $74,600 limit.

IV.

The $48,600 Aggregate Limit on Contributions to State Party Committees and PACs Is Non-Severable and So Should Be Struck.

Congress drafted 2 U.S.C. 441a(a)(3)(B) in an unusual way. It logically and grammatically intertwined the $74,600 aggregate limit with the $48,600 sub-limit on non-national party committees. *See* MB-App. 4a. By contrast, in 441a(a)(1), Congress listed base limits in easily severable sub-sections. *See* MB-App. 3a. But in 441a(a)(3)(B), Congress intertwined the $74,600 limit with the $48,600 sub-limit, so striking the former leaves meaningless language:

> [N]o individual may make contributions aggregating more than—
>
> . . .
>
> (B) ~~[$74,600], in the case of any other contributions,~~ of which not more than [$48,600] may be attributable to contributions to political committees which are not political committees of national political parties.

Fixing this would require the Court to rewrite the provision. "[I]t is for Congress, not this Court, to rewrite the statute." *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). Congress "would have intended [this Court] to set aside the . . . limits, leaving [it] free to rewrite." *Randall*, 548 U.S. at 262 (plurality).

Because the $48,600 sub-limit on contributions to non-national party committees is an integral part of 441a(a)(3)(B), Congress thereby indicated its intention that the provision operate as a unit. So the sub-limit is non-severable and must fall with the whole provision.

V.

The $48,600 Aggregate Limit on Contributions to Candidates Is Unconstitutional.

The $48,600 aggregate limit on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A) (MB-App. 4a), also violates First Amendment rights. It bars contributors from expressing support for, and associating with, all the candidates they choose with full-base-level contributions.[41] The lower court erroneously did not separately address this limit, though this limit is even less defensible than the $74,600 aggregate limit.

---

[41] Even candidates who do not represent a contributor's home-district or state have a direct effect on the contributor, so contributors have an interest in races elsewhere.

A. The Applicable Concern Is Preventing Conduit-Contributions.

The *Buckley* Court did not suggest a mechanism for how an unearmarked conduit-contribution might pass from an individual, through a candidate committee, to another intended, particular candidate. *See* 424 U.S. at 38. Because *Buckley*'s analysis should guide this analysis, there must be a cognizable conduit-contribution mechanism. *Id. See supra* at 15-18.

As noted above, *base* limits on contributions to candidates must be justified by an anti-*corruption* interest, *Buckley*, 424 U.S. at 26-28, while *aggregate* limits may be justified by the derivative *conduit-contribution* concern, *id.* at 38. *See* Part II(D)(1)-(2). To the limited extent that candidate committees may contribute to other candidates, the *base* limit on contributions to candidates might *also* be justified by a conduit-contribution concern. Congress only perceived, and asserted, its anti-corruption interest and conduit-contribution concern as far as its limits on contributions to and by candidate committees.[42]

To uphold the aggregate limits on contributions to candidates, a cognizable conduit-contribution mechanism must be proven, i.e., a means by which an individual's unearmarked contribution to a candidate committee yields a "massive" contribution to another, intended "particular candidate." *See Buckley*, 424 U.S. at 38.

---

[42] The ability of candidate committees to transfer funds to party committees does not implicate the conduit-contribution concern because Congress expressly permits such transfers (without limitation), thereby asserting no interest in regulating them. 2 U.S.C. 439a(a)(4); 11 C.F.R. 113.2(c). This makes transfers inapplicable to a proposed conduit-contribution mechanism.

The mechanism must be based on the function of the aggregate limit *itself*, as was *Buckley*'s mechanism. *Id.*

B. The Government Cannot Justify the Aggregate Limit Under Either Exacting or Strict Scrutiny.

Strict scrutiny should apply, *see* Part I, though exacting scrutiny suffices for McCutcheon to prevail because the aggregate limit is not supported by either the anti-corruption interest or a derivative conduit-contribution concern, required by *Buckley*. *See* 424 U.S. at 38.

Buckley did not even *suggest* that the "ceiling" on all of an individual's political contributions might be justified by circumvention of the $1,000/election base limit on contributions to candidates through the use of *candidate committees* for conduit-contributions. *Id.* at 23, 38. Under the *Buckley*-era FECA scheme, no "huge" contribution could be given to a candidate committee, so no "massive" conduit-contribution could be channeled through one. *Id.* And there was no candidate-committee proliferation because each candidate had one principal-campaign committee, *id.* at 187, and contributions to any authorized candidate committee were deemed made to the candidate, *id.* at 189-90. So *Buckley*'s conduit-contribution mechanism did not, and does not, apply to candidate committees.

These limits remain low: a $2,600/election base limit and a $2,000/election candidate-to-candidate-limit. *See* MB-App. 17a.[43] Congress had no need to fix

---

[43] The $2,000 candidate-to-candidate contribution-limit raises no cognizable conduit-contribution concern. If used to support a Senate (statewide) candidate, $2,000 is only five

(continued...)

conduit-contribution problems regarding candidate-committees in the 1976, post-*Buckley* FECA amendments because there were none.

The lower court proposed no conduit-contribution mechanism *specific* to candidate committees, though the joint-fundraising mechanism it offered would fail as applied solely to candidate committees, based on the principles and reasons stated in Part II. Generally, no "huge" contributions can be made *to* a candidate committee, no "massive" contribution can be made *by* a candidate committee. Name-of-another and earmarking laws prohibit any implicit earmarking, and earmarked contributions are subject to both contribution limits and reporting requirements—and assuming that individuals and candidate committees will violate the law in order to layer on another prophylaxis is a flawed analysis because otherwise endless prophylaxes could be created based on the same interest but assuming all prior laws would be violated. *See supra* at 38-39, 50-51. Neither transfers nor any tally system (none is in evidence here) may be considered as part of conduit-contribution mechanism because Congress asserted no interest in restricting transfers, *see supra* at 20, 54 n.42, and FEC expressly recognizes that a tally system is permissible so long as all contribution limits, ear-

---

[43] (...continued)
times greater than the $400 limit struck down in *Randall* as too low to further a statewide campaign in tiny Vermont. *Randall*, 548 U.S. at 253, 261-62. Moreover, this non-inflation-adjusted, $2,000 limit is lower than the $2,600 base limit on an individual's contribution to a candidate—the level at which Congress perceived, and asserted, its anti-corruption interest regarding a contribution to a candidate.

marking requirements, and reporting laws are followed, *see supra* at 41-42, 48 n.38. So there is no means by which conduit-contributions can be made, and thus no justification based on a conduit-contribution concern for an aggregate limit on individuals' contributions to candidate committees.

Though *Buckley*'s analysis requires the government to prove a "massive"-conduit-contribution mechanism, 424 U.S. at 38, examining this aggregate limit under a simple quid-pro-quo corruption analysis is also instructive.

A quid-pro-quo corruption interest may justify the base limit on a contribution to a candidate. *Id.* at 26. But it does not justify the aggregate limit because a contribution at the full-base-level limit (currently $2,600/election) to all of candidates *A*-*Y* cannot corrupt candidate *Z*. There is no monetary quid for an official quo (absent all manner of illegal activity). *Buckley*'s description of quid-pro-quo corruption involved a large sum to a *particular* candidate who then gives a quid for that quo, *id.* at 26, which is absent with respect to *Z*. At best *Z* could be grateful for contributions to other candidates, but gratitude is a forbidden theory of corruption. *Citizens United*, 130 S. Ct. at 909-10. Thus, the aggregate limit is overbroad as to the anti-corruption interest. It is merely a prophylaxis-on-prophylaxis layer atop the limits on contributions to and by candidate committees that already eliminate a quid-pro-quo risk. It is irrelevant to the conduit-contribution concern, which is derivative of the anti-corruption interest. Thus, it is not properly tailored (closely or narrowly) to the anti-corruption interest.

As a result it becomes clear that this aggregate limit serves only the forbidden equalizing interest.

Consider that, in 2006, this Court held that a $200 per election limit on contributions to Vermont statewide candidates was unconstitutionally low. *Randall*, 548 U.S. at 249, 262-63. Vermont's 2004 population was 621,000, *id.* at 250, well below the 646,947 population of the average congressional district.[44] In 2006, the aggregate-limit was $40,000. If an individual wanted to make an equal contribution to a candidate in all federal races (435 House, 33 Senate), she would have been limited by the aggregate limit to $43/election per candidate (assuming primary and general elections). That is far below the $1,000/election per candidate base-limit at which Congress perceived, and asserted, any anti-corruption interest or conduit-contribution concern.

Finally, if candidate committees posed no cognizable conduit-contribution risk in *Buckley*, they pose even *less* risk now because, in BCRA, Congress restricted what contributors could do in three ways:

- It failed to properly inflation-adjust the 1974 FECA-scheme that *Buckley* considered. The old $1,000 base limit on a person's contribution to a candidate is now worth $4,722, not the current $2,600; the $1,000 that one candidate could give another is also now worth $4,722, not the current $2,000; and if an individual wanted to give his whole "$25,000 ceiling" to candidates, that ceiling is now worth $118,039, not the current $48,600. *See* http://www.bls.gov/data/inflation_calculator. htm.
- BCRA decreased the number of candidates an individual may express support for, and associate with, at the full-base-level limit in single elections, from

---

[44] Dividing the 2000 U.S. population, 281,421,90, by 435.

twenty-five to eighteen ($25,000/$1,000 versus $48,600/$2,600), or only nine if the same candidates are supported in both primary and general elections.

- Congress gave contributions to candidates their own aggregate limit, 2 U.S.C. 441a(a)(3)(A), rather than including them with other contributions as under the old "ceiling." Congress thus asserted that giving *solely* to candidates poses a conduit-contribution risk. So the constitutionality of this aggregate limit must be justified alone, making the lower court's analysis of the aggregate "limits as a coherent system," JS-App. 13a, erroneous.

In sum, because 2 U.S.C. 441a(a)(3)(A) is unsupported by a conduit-contribution concern and is overbroad with regard to the anti-corruption interest, this aggregate limit is unconstitutional.

Conclusion

The limit at 2 U.S.C. 441a(a)(3)(B) should be held unconstitutional, as applied to national party committees and facially, and its sub-limit should be struck as non-severable. The limit at 2 U.S.C. 441a(a)(3)(A) should be held unconstitutional.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Anita Y. Woudenberg
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/235-3685 facsimile
jboppjr@aol.com
Counsel for Republican National Committee

Stephen M. Hoersting
700 E. Schantz Ave.
Dayton, OH 45419
Hoersting@gmail.com
937/623-6102
Of Counsel

May 6, 2013

Appendix

Merits Brief Appendix ("MB-App.") Table of Contents

U.S. Constitution, Amendment I. 1a

18 U.S.C. 608(b) (1974). 1a

2 U.S.C. 441a(a)(1)-(5), (8) ("Limitations, contributions, and expenditures"). 3a

2 U.S.C. 441f ("Contributions in name of another prohibited"). 6a

11 C.F.R. 100.5(g) ("Political committee"). 7a

11 C.F.R. 110.4(b) ("Contributions in the name of another"). 10a

11 C.F.R. 110.5(a)-(b) ("Aggregate biennial contribution limitation for individuals"). 11a

11 C.F.R. 110.6 ("Earmarked contributions"). . . . 12a

FEC, *Contribution Limits for 2013-2014*. 17a

Buckley-Scheme and BCRA-Scheme Charts. 18a

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

---

18 U.S.C. 608(b) (1974)

(*See Buckley v. Valeo*, 424 U.S. 1, 189 (1976).)

(b) *Contributions by persons and committees.*

(1) Except as otherwise provided by paragraphs (2) and (3), no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000.

(2) No political committee (other than a principal campaign committee) shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $5,000. Contributions by the national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States shall not exceed the limitation imposed by the preceding sentence with respect to any other candidate for Federal office. For purposes of this paragraph, the term "political committee" means an organization registered as a political committee under section 433, Title 2, United States Code, for a period of not less than 6 months which has received contributions from more than 50 persons and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(3) No individual shall make contributions aggregating more than $25,000 in any calendar year. For purposes of this paragraph, any contribution made in a year other than the calendar year in which the election is held with respect to which such contribution was made, is considered to be made during the calendar year in which such election is held.

(4) For purposes of this subsection

(A) contributions to a named candidate made to any political committee authorized by such candidate, in writing, to accept contributions on his behalf shall be considered to be contributions made to such candidate; and

(B) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of such party for election to the office of President of the United States.

(5) The limitations imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(6) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and

the intended recipient of such contribution to the Commission and to the intended recipient.

---

2 U.S.C. 441a(a)(1)-(5), (8)

Limitations, contributions, and expenditures

[2013-14 limits in brackets]

(a) *Dollar limits on contributions.*

(1) Except as provided in subsection (i) of this section and section 441a-1 of this title, no person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000 [$2,600];

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $25,000 [$32,400];

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000 [$5,000]; or

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000 [$10,000].

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000 [$5,000];

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000 [$15,000]; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000 [$5,000].

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—

(A) $37,500 [$48,600], in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500 [$74,600], in the case of any other contributions, of which not more than $37,500 [$48,600] may be attributable to contributions to political committees which are not political committees of national political parties.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by

political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee, except that

(A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fund raising efforts;

(B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and

(C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if

(i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices;

(ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and

(iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of Title 26.

In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for purposes of the limitations provided by paragraph (1) and paragraph (2).

* * *

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

---

2 U.S.C. 441f

Contributions in name of another prohibited

No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

11 C.F.R. 100.5(g)

Political committee

(2 U.S.C. 431 (4) (5) (6))

(g) *Affiliated committee.* (1) All authorized committees of the same candidate for the same election to Federal office are affiliated.

(2) All committees (including a separate segregated fund, see 11 CFR part 114) established, financed, maintained or controlled by the same corporation, labor organization, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. Local unit may include, in appropriate cases, a franchisee, licensee, or State or regional association.

(3) Affiliated committees sharing a single contribution limitation under paragraph (g)(2) of this section include all of the committees established, financed, maintained or controlled by—

(i) A single corporation and/or its subsidiaries;

(ii) A single national or international union and/or its local unions or other subordinate organizations;

(iii) An organization of national or international unions and/or all its State and local central bodies;

(iv) A membership organization, (other than political party committees, see 11 CFR 110.3(b)) including trade or professional associations, see 11 CFR 114.8(a), and/or related State and local entities of that organization or group; or

(v) The same person or group of persons.

(4)(i) The Commission may examine the relationship between organizations that sponsor committees, between the committees themselves, or between one sponsoring organization and a committee established

by another organization to determine whether committees are affiliated.

(ii) In determining whether committees not described in paragraphs (g)(3) (i)-(iv) of this section are affiliated, the Commission will consider the circumstantial factors described in paragraphs (g)(4)(ii) (A) through (J) of this section. The Commission will examine these factors in the context of the overall relationship between committees or sponsoring organizations to determine whether the presence of any factor or factors is evidence of one committee or organization having been established, financed, maintained or controlled by another committee or sponsoring organization. Such factors include, but are not limited to:

(A) Whether a sponsoring organization owns controlling interest in the voting stock or securities of the sponsoring organization of another committee;

(B) Whether a sponsoring organization or committee has the authority or ability to direct or participate in the governance of another sponsoring organization or committee through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;

(C) Whether a sponsoring organization or committee has the authority or ability to hire, appoint, demote or otherwise control the officers, or other decision-making employees or members of another sponsoring organization or committee;

(D) Whether a sponsoring organization or committee has a common or overlapping membership with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;

(E) Whether a sponsoring organization or committee has common or overlapping officers or employees

with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;

(F) Whether a sponsoring organization or committee has any members, officers or employees who were members, officers or employees of another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees, or which indicates the creation of a successor entity;

(G) Whether a sponsoring organization or committee provides funds or goods in a significant amount or on an ongoing basis to another sponsoring organization or committee, such as through direct or indirect payments for administrative, fundraising, or other costs, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17;

(H) Whether a sponsoring organization or committee causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17;

(I) Whether a sponsoring organization or committee or its agent had an active or significant role in the formation of another sponsoring organization or committee; and

(J) Whether the sponsoring organizations or committees have similar patterns of contributions or contributors which indicates a formal or ongoing relationship between the sponsoring organizations or committees.

(5) Notwithstanding paragraphs (g)(2) through (g)(4) of this section, no authorized committee shall be deemed affiliated with any entity that is not an authorized committee.

---

11 C.F.R. 110.4(b)

Contributions in the name of another; cash contributions

(2 U.S.C. 441f, 441g, 432(c)(2))

(b) *Contributions in the name of another.* (1) No person shall—

(i) Make a contribution in the name of another;

(ii) Knowingly permit his or her name to be used to effect that contribution;

(iii) Knowingly help or assist any person in making a contribution in the name of another; or

(iv) Knowingly accept a contribution made by one person in the name of another.

(2) Examples of *contributions in the name of another* include—

(i) Giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made, see 11 CFR 110.6; or

(ii) Making a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source.

11 C.F.R. 110.5(a)-(b)

Aggregate biennial contribution limitation for individuals

(2 U.S.C. 441a(a)(3))

[2013-14 limits in brackets]

(a) *Scope.* This section applies to all contributions made by any individual, except individuals prohibited from making contributions under 11 CFR 110.20 and 11 CFR part 115.

(b) *Biennial limitations.* (1) In the two-year period beginning on January 1 of an odd-numbered year and ending on December 31 of the next even-numbered year, no individual shall make contributions aggregating more than $95,000 [$123,200], including no more than:

(i) $37,500 [$48,600] in the case of contributions to candidates and the authorized committees of candidates; and

(ii) $57,500 [$74,600] in the case of any other contributions, of which not more than $37,500 [$48,600] may be attributable to contributions to political committees that are not political committees of any national political parties.

(2) [Reserved by 73 FR 79602]

(3) The contribution limitations in paragraph (b)(1) of this section shall be increased by the percent difference in the price index in accordance with 11 CFR 110.17. The increased contribution limitations shall be in effect for the two calendar years starting on January 1 of the year in which the contribution limitations are increased.

(4) In every odd-numbered year, the Commission will publish in the Federal Register the amount of the

contribution limitations in effect and place such information on the Commission's Web site.

---

11 C.F.R. 110.6

Earmarked contributions

(2 U.S.C. 441a(a)(8))

(a) *General.* All contributions by a person made on behalf of or to a candidate, including contributions which are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit, are contributions from the person to the candidate.

(b) *Definitions.* (1) For purposes of this section, *earmarked* means a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.

(2) For purposes of this section, *conduit or intermediary* means any person who receives and forwards an earmarked contribution to a candidate or a candidate's authorized committee, except as provided in paragraph (b)(2)(i) of this section.

(i) For purposes of this section, the following persons shall not be considered to be conduits or intermediaries:

(A) An individual who is an employee or a full-time volunteer working for the candidate's authorized committee, provided that the individual is not acting in his or her capacity as a representative of an entity prohibited from making contributions;

(B) A fundraising representative conducting joint fundraising with the candidate's authorized committee pursuant to 11 CFR 102.17 or 9034.8;

(C) An affiliated committee, as defined in 11 CFR 100.5(g);

(D) A commercial fundraising firm retained by the candidate or the candidate's authorized committee to assist in fundraising; and

(E) An individual who is expressly authorized by the candidate or the candidate's authorized committee to engage in fundraising, and who occupies a significant position within the candidate's campaign organization, provided that the individual is not acting in his or her capacity as a representative of an entity prohibited from making contributions.

(ii) Any person who is prohibited from making contributions or expenditures in connection with an election for Federal office shall be prohibited from acting as a conduit for contributions earmarked to candidates or their authorized committees. The provisions of this section shall not restrict the ability of an organization or committee to serve as a collecting agent for a separate segregated fund pursuant to 11 CFR 102.6.

(iii) Any person who receives an earmarked contribution shall forward such earmarked contribution to the candidate or authorized committee in accordance with 11 CFR 102.8, except that—

(A) A fundraising representative shall follow the joint fundraising procedures set forth at 11 CFR 102.17.

(B) A person who is prohibited from acting as a conduit pursuant to paragraph (b)(2)(ii) of this section shall return the earmarked contribution to the contributor.

(c) *Reporting of earmarked contributions*—(1) *Reports by conduits and intermediaries.* (i) The intermediary or conduit of the earmarked contribution shall report the original source and the recipient candidate or authorized committee to the Commission or the Secretary of the Senate, as appropriate (see 11 CFR part 105), and to the recipient candidate or authorized committee.

(ii) The report to the Commission or Secretary shall be included in the conduit's or intermediary's report for the reporting period in which the earmarked contribution was received, or, if the conduit or intermediary is not required to report under 11 CFR part 104, by letter to the Commission within thirty days after forwarding the earmarked contribution.

(iii) The report to the recipient candidate or authorized committee shall be made when the earmarked contribution is forwarded to the recipient candidate or authorized committee pursuant to 11 CFR 102.8.

(iv) The report by the conduit or intermediary shall contain the following information:

(A) The name and mailing address of each contributor and, for each earmarked contribution in excess of $200, the contributor's occupation and the name of his or her employer;

(B) The amount of each earmarked contribution, the date received by the conduit, and the intended recipient as designated by the contributor; and

(C) The date each earmarked contribution was forwarded to the recipient candidate or authorized committee and whether the earmarked contribution was forwarded in cash or by the contributor's check or by the conduit's check.

(v) For each earmarked contribution passed through the conduit's or intermediary's account, the informa-

tion specified in paragraph (c)(1)(iv) (A) through (C) of this section shall be itemized on the appropriate schedules of receipts and disbursements attached to the conduit's or intermediary's report, or shall be disclosed by letter, as appropriate. For each earmarked contribution forwarded in the form of the contributor's check or other written instrument, the information specified in paragraph (c)(1)(iv) (A) through (C) of this section shall be disclosed as a memo entry on the appropriate schedules of receipts and disbursements attached to the conduit's or intermediary's report, or shall be disclosed by letter, as appropriate.

(2) *Reports by recipient candidates and authorized committees.* (i) The recipient candidate or authorized committee shall report each conduit or intermediary who forwards one or more earmarked contributions which in the aggregate exceed $200 in any calendar year.

(ii) The report by the recipient candidate or authorized committee shall contain the following information:

(A) The identification of the conduit or intermediary, as defined in 11 CFR 100.12;

(B) The total amount of earmarked contributions received from the conduit or intermediary and the date of receipt; and

(C) The information required under 11 CFR 104.3(a) (3) and (4) for each earmarked contribution which in the aggregate exceeds $200 in any calendar year.

(iii) The information specified in paragraph (c)(2)(ii) (A) through (C) of this section shall be itemized on Schedule A attached to the report for the reporting period in which the earmarked contribution is received.

(d) *Direction or control.* (1) A conduit's or intermediary's contribution limits are not affected by the forwarding of an earmarked contribution except where the conduit or intermediary exercises any direction or control over the choice of the recipient candidate.

(2) If a conduit or intermediary exercises any direction or control over the choice of the recipient candidate, the earmarked contribution shall be considered a contribution by both the original contributor and the conduit or intermediary. If the conduit or intermediary exercises any direction or control over the choice of the recipient candidate, the report filed by the conduit or intermediary and the report filed by the recipient candidate or authorized committee shall indicate that the earmarked contribution is made by both the original contributor and the conduit or intermediary, and that the entire amount of the contribution is attributed to each.

Contribution Limits for 2013-2014

(FEC publication, available at www.fec.gov/info/contriblimitschart1314.pdf)

	To each candidate or candidate committee per election	To national party committee per calendar year	To state, district & local party committee per calendar year	To any other political committee per calendar year[1]	Special Limits
Individual may give	$2,600*	$32,400*	$10,000 (combined limit)	$5,000	$123,200* overall biennial limit: • $48,600* to all candidates • $74,600* to all PACs & parties[2]
National Party Committee may give	$5,000	No Limit	No Limit	$5,000	$45,400* to Senate candidate per campaign[3]
State, District & Local Party Committee may give	$5,000 (combined limit)	No Limit	No Limit	$5,000 (combined limit)	No Limit
PAC (multicandidate)[4] may give	$5,000	$15,000	$5,000 (combined limit)	$5,000	No Limit
PAC (not multicandidate) may give	$2,600*	$32,400*	$10,000 (combined limit)	$5,000	No Limit
Authorized Campaign Committee may give	$2,000[5]	No Limit	No Limit	$5,000	No Limit

---

These contribution limits are indexed for inflation.

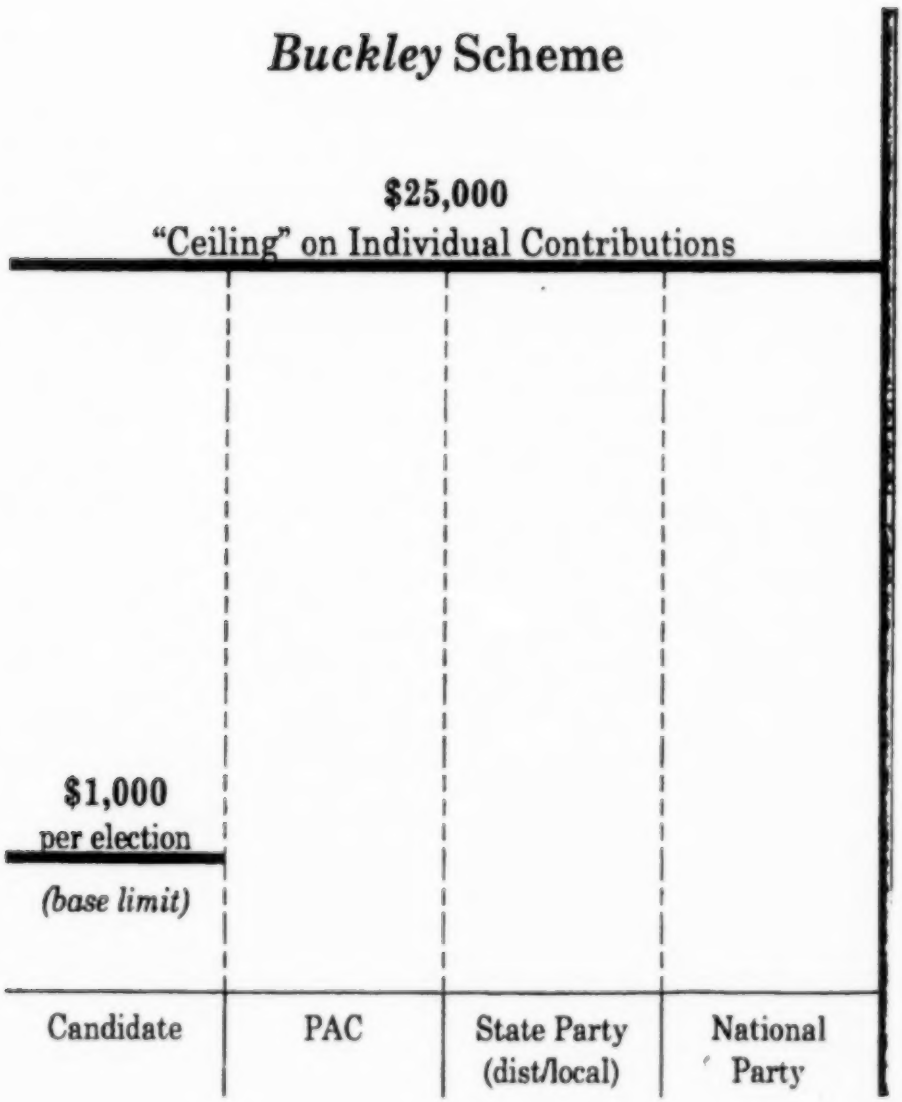
A contribution earmarked for a candidate through a political committee counts against the original contributor's limit for that candidate. In certain circumstances, the contribution may also count against the contributor's limit to the PAC. 11 CFR 110.6. See also 11 CFR 110.1(h).

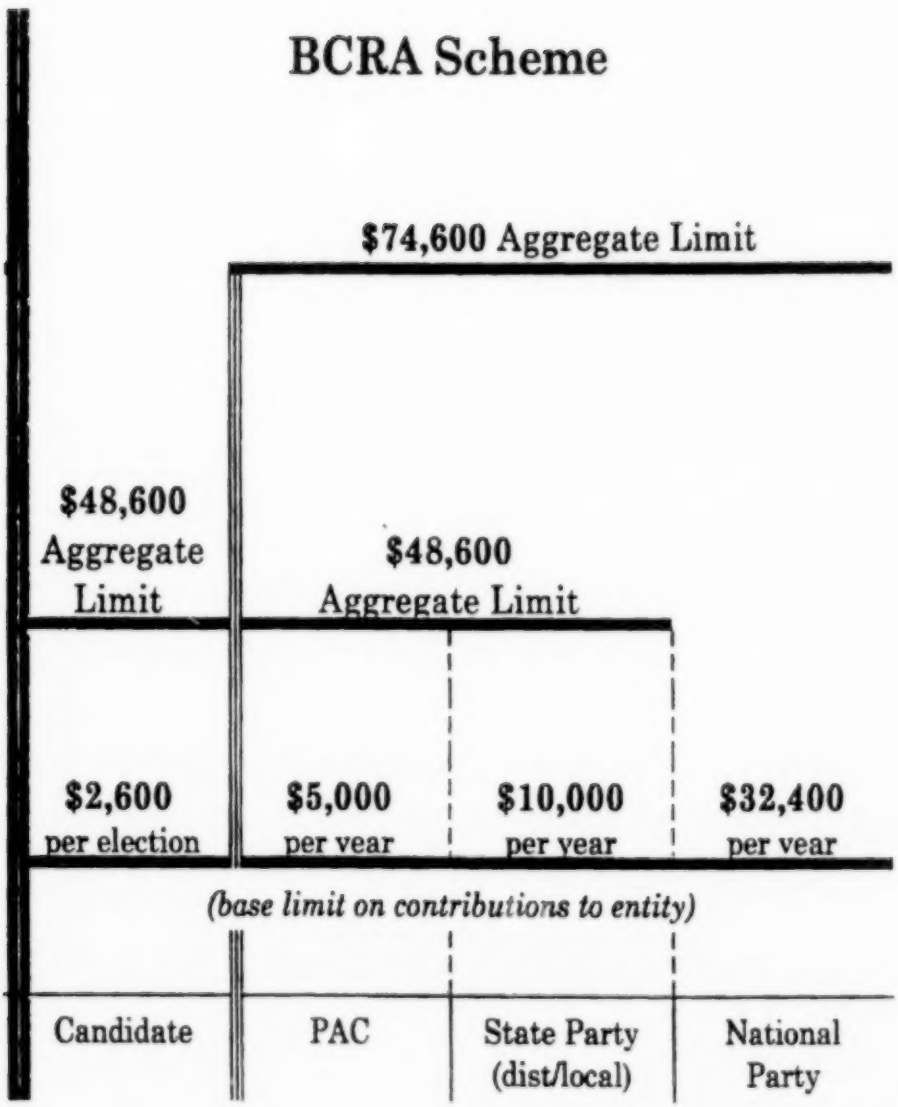
No more than $48,600 of this amount may be contributed to state and local party committees and PACs.

This limit is shared by the national committee and the national Senate campaign committee.

A multicandidate committee is a political committee with more than 50 contributors which has been registered for at least 6 months and, with the exception of state party committees, has made contributions to 5 or more candidates for federal office. 11 CFR 100.5(e)(3).

A federal candidate's authorized committee(s) may contribute no more than $2,000 per election to another federal candidate's authorized committee(s). 11 CFR 102.12(c)(2).


Buckley Scheme
$25,000
"Ceiling" on Individual Contributions
$1,000
per election
(base limit)
Candidate
PAC
State Party
(dist/local)
National
Party


BCRA Scheme
$74,600 Aggregate Limit
$48,600 Aggregate Limit
$48,600 Aggregate Limit
$2,600 per election
$5,000 per year
$10,000 per year
$32,400 per year
(base limit on contributions to entity)
Candidate
PAC
State Party (dist/local)
National Party

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

FILED
JUL 18 2013
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 12-536

In the Supreme Court of the United States

SHAUN MCCUTCHEON, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
MALCOLM L. STEWART
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

LISA J. STEVENSON
Deputy General Counsel
KEVIN DEELEY
ADAV NOTI
Acting Associate General Counsels
CHARLES KITCHER
Attorney
Federal Election Commission
Washington, D.C. 20463

Library of Congress
Law Library

QUESTION PRESENTED

Whether the three-judge district court correctly rejected appellants' constitutional challenge to the federal statutory limits on the aggregate amounts that an individual may contribute to all federal candidates, political parties, and other political committees in a single election cycle, 2 U.S.C. 441a(a)(3).

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Constitutional provisions, statutes, and regulations involved 2
Statement 2
Summary of argument 13
Argument 16
I. This Court should adhere to *Buckley*'s holding that aggregate contribution limits are not subject to strict scrutiny 17
A. The court in *Buckley* declined to apply strict scrutiny to contribution limits, including aggregate contribution limits 17
B. Appellants' arguments for applying strict scrutiny to aggregate contribution limits cannot be squared with *Buckley* 19
C. Appellants provide no sound reason to overrule *Buckley*'s longstanding distinction between contribution limits and expenditure limits 25
II. This Court should adhere to *Buckley*'s holding that aggregate contribution limits are constitutional 31
A. The court in *Buckley* upheld FECA's base and aggregate contribution limits as valid measures to help prevent actual and apparent corruption 31
B. FECA's current aggregate contribution limits serve the same important purposes as the aggregate contribution limit upheld in *Buckley* 34
C. *Buckley* forecloses appellants' challenge to the aggregate limits in the current version of FECA 43

Table of Contents—Continued: Page

1. The current version of FECA has not changed in any relevant way from the version considered in *Buckley* 43
2. Appellants' challenges to FECA's aggregate contribution limits cannot be reconciled with *Buckley* 49

Conclusion 57

Appendix — Constitutional, statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

Arizona Free Enter. Club's Freedom Club PAC v. *Bennett*, 131 S. Ct. 2806 (2011) 11, 24, 25, 34

Buckley v. *Valeo*, 424 U.S. 1 (1976) ..... *passim*

California Med. Ass'n v. *FEC*, 453 U.S. 182 (1981) 12, 48, 49

Citizens Against Rent Control v. *City of Berkeley*, 454 U.S. 290 (1981) 26

Citizens United v. *FEC*, 558 U.S. 310 (2010) 7, 25

Crandon v. *United States*, 494 U.S. 152 (1990) 28

Davis v. *FEC*, 554 U.S. 724 (2008) 24, 35

Dickerson v. *United States*, 530 U.S. 428 (2000) 29

FEC v. *Beaumont*, 539 U.S. 146 (2003) 17, 25, 30

FEC v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) ..... *passim*

FEC v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) 39

FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 25, 30

FEC v. *National Conservative Political Action Comm.*, 470 U.S. 480 (1985) 26

Cases—Continued: Page

FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982) 27, 30
FEC v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) 52
Hubbard v. *United States*, 514 U.S. 695 (1995) 29, 30
McConnell v. *FEC*:
540 U.S. 93 (2003), overruled in part by *Citizens United* v. *FEC*, 558 U.S. 310 (2010) ..... *passim*
251 F. Supp. 2d 176 (D.D.C.), aff'd in part, rev'd in part, 540 U.S. 93 (2003) 8
Nixon v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) ..... *passim*
Randall v. *Sorrell*, 548 U.S. 230 (2006) 13, 26, 29, 31, 35
SpeechNow.org v. *FEC*, 599 F.3d 686 (D.C. Cir.), cert. denied, 131 S. Ct. 553 (2010) 21, 22
Tashjian v. *Republican Party of Conn.*, 479 U.S. 208 (1986) 25
United States v. *Sun-Diamond Growers*, 526 U.S. 398 (1999) 28

Constitution, statutes, regulations and rule:

U.S. Const. Amend. I ..... *passim*
Act of July 19, 1940, ch. 640, § 4, 54 Stat. 770 2
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 8
§ 102, 116 Stat. 86-87 8
§ 307, 116 Stat. 102-103 8
§ 401, 116 Stat. 112 56
§ 403(a), 116 Stat. 113-114 11
Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 3

Statutes, regulations and rule—Continued: Page

2 U.S.C. 431(8)(B)(i) 22
2 U.S.C. 431(11) 35
2 U.S.C. 431(17) 22
2 U.S.C. 432(e)(3)(B) 38
2 U.S.C. 439a 29
2 U.S.C. 439a(a)(4) 15, 23, 39
2 U.S.C. 441a(a)(1)(A) 9, 15, 35, 37, 38, 48
2 U.S.C. 441a(a)(1)(B) 9, 15, 23, 36, 37, 48
2 U.S.C. 441a(a)(1)(C) 9, 15, 35, 37, 48
2 U.S.C. 441a(a)(1)(D) 9, 15, 23, 36, 37, 48
2 U.S.C. 441a(a)(2)(A) 15, 23, 35, 37, 48
2 U.S.C. 441a(a)(2)(B) 36
2 U.S.C. 441a(a)(2)(C) 36
2 U.S.C. 441a(a)(3)(A) 9
2 U.S.C. 441a(a)(3)(B) 9, 10
2 U.S.C. 441a(a)(4) 15, 23, 37, 39, 49
2 U.S.C. 441a(a)(5) 46
2 U.S.C. 441a(a)(7)(B)(i) 38
2 U.S.C. 441a(a)(8) 44
2 U.S.C. 441a(c)(1) 9
2 U.S.C. 441a(d)(3) 38
2 U.S.C. 454 note 56
Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263 ..... 4, 5, 6
Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 112, 90 Stat. 487 6
18 U.S.C. 201(b)(1) 41
18 U.S.C. 608(b)(6) 44

Regulations—Continued: Page

5 C.F.R.:
Section 2653.202(a)(2) 28
Section 2635.203(f)(2) 42
11 C.F.R.:
Section 100.2 9
Section 100.5(g) 46
Section 102.6(b)-(c) 37
Section 102.17 37
Section 110.3(b)(3) 37
Section 110.6(c)(2) 45
Section 113.2(c) 39
Senate R. 35(b)(2)(A) 42

Miscellaneous:

David W. Adamany & George E. Agree, *Political Money: A Strategy for Campaign Financing in America* (1975) 3, 5
Herbert E. Alexander, *Financing Politics: Money, Elections and Political Reform* (1976) 3, 5
American Legacy PAC, *Who We Support*, http://www.americanlegacypac.org/who-we-support (last visited July 17, 2013) 36
Kevin Bogardus, *Lobbyists Fear Shakedown If Supreme Court Lifts Campaign Contributions Cap*, The Hill, Feb. 26, 2013, http://thehill.com/business-a-lobbying/284817-lobbyists-fear-shakedown-if-court-lifts-campaign-cap#ixzz2M23oRhX0 42
Conciliation Agreement, *In re DSCC* (Aug. 21, 1995) 44
86 Cong. Rec. 2720 (1940) 2
117 Cong. Rec. (1971):
p. 28,811 4

Miscellaneous—Continued: Page

p. 29,306 4
p. 43,410 4
122 Cong. Rec. 12,199 (May 3, 1976) 6
147 Cong. Rec. 4634 (Mar. 27, 2001) 9
148 Cong. Rec. 3615 (Mar. 20, 2002) 8
Democratic Cong. Campaign Comm., *Red To Blue 2012*, http://www.dccc.org/pages/redtoblue (last visited July 17, 2013) 46
Democratic Party of N.M., *Report of Receipts and Disbursements*, Apr. 8, 2013, http://images.nictusa.com/pdf/488/13961253488/13961253488.pdf 45
Dep't of Justice, *Former Lobbyist Jack Abramoff Pleads Guilty to Charges Involving Corruption, Fraud Conspiracy, and Tax Evasion* (Jan. 3, 2006), http://www.justice.gov/opa/pr/ 2006/January/06_crm_002.html 54
FEC:
2011-2012 Election Cycle: Total Disbursements by Entity Type, http://www.fec.gov/law/2012TDbyEntity.shtml (last visited July 17, 2013) 29
2012 Leadership PACs and Sponsors, http://www.fec.gov/data/Leadership.do?format=html&election_yr=2012 (last visited July 17, 2013) 39
Committees And Candidates Supported/Opposed: Conservative Action Fund, http://query.nictusa.com/cgi-bin/com_supopp/C00496505 (last visited July 17, 2013) 22
Detailed Files About Candidates, Parties and Other Committees, http://www.fec.gov/finance/disclosure/ftpdet.shtml (last visited July 17, 2013) 38

Miscellaneous—Continued: Page

Disclosure Data Catalog, http://www.fec.gov/data/DataCatalog.do?cf=downloadable (last visited July 17, 2013) 38

PAC Count—1974 to Present, Jan. 2013, http://www.fec.gov/press/summaries/2011/2011paccount.shtml 36

Transaction Query By Individual Contributor, http://www.fec.gov/finance/disclosure/norindsea.shtml (last visited July 17, 2013) 22

76 Fed. Reg. 8369-8370 (Feb. 14, 2011) 10

Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 981, 93d Cong., 2d Sess. (1974) 4, 5, 40

Fletcher's Opinion on the Application of Hatch Act, N.Y. Times, Aug. 4, 1940 3

James V. Grimaldi & Susan Schmidt, *Lawmaker From Ohio Subpoenaed In Abramoff Case*, Washington Post, Nov. 5, 2005 54

Letter from Jin Lee, Attorney, FEC, to Mark Elias and Jonathan Berkon, Perkins Coie LLP (Nov. 19, 2012), http://eqs.sdrdc.com/eqsdocsMUR/13044330348.pdf 45

James C. McKinley, Jr., *DeLay Convicted In Donation Case by a Texas Jury*, N.Y. Times, Nov. 25, 2010 54

Missouri Democratic State Comm., *Report of Receipts and Disbursements*, May 13, 2013, http://images.nictusa.com/pdf/727/13962195727/13962195727.pdf 46

Robert E. Mutch, *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law* (1988) 3

Miscellaneous—Continued: Page

National Conference of State Legislatures, *Contribution Limits: An Overview*, http://www.ncsl.org/legislatures-elections/elections/campaign-contribution-limits-overview.aspx (last visited July 17, 2013) 30

Louise Overacker, *Presidential Campaign Funds* (1978) 3

Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. (Feb. 6, 2013):

p. 8530 9

pp. 8531-8532 38

p. 8532 ..... 9, 10, 35, 36, 37, 48

Richard Reeves, *President Nixon: Alone in the White House* (2001) 5

S. Rep. No. 167, 105th Cong., 2d Sess. (1998) 7

Steve Schultze & Richard P. Jones, *Chvala Charged With Extortion*, Milwaukee J. Sentinel, Oct. 18, 2002 54

U.S. House of Representatives, Committee on Appropriations, *Full Committee Members*, http://appropriations.house.gov/about/members/ (last visited July 17, 2013) 43

Steven Walters & Patrick Marley, *Chvala Pleads Guilty To Two Felonies*, Milwaukee J. Sentinel, Oct. 16, 2005 53

Jodi Wilgoren, *Leader Charged With Extortion and Misconduct*, N.Y. Times, Oct. 18, 2002 54

Young Americans for Liberty, *YAL PAC*, http://www.yaliberty.org/pac (last visited July 17, 2013) 36

In the Supreme Court of the United States

No. 12-536

SHAUN MCCUTCHEON, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the three-judge district court granting appellee's motion to dismiss (J.S. App. 1a-17a) is reported at 893 F. Supp. 2d 133.

JURISDICTION

The order and final judgment of the three-judge district court was entered on September 28, 2012. A notice of appeal was filed on October 9, 2012, and the jurisdictional statement was filed on October 26, 2012. This Court noted probable jurisdiction on February 19, 2013. The jurisdiction of this Court rests on Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 113-114.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant constitutional provisions, statutes, and regulations are reprinted in an appendix to this brief. App., *infra*, 1a-21a.

STATEMENT

1. For more than 70 years, federal law has generally limited the amounts that individuals may contribute to political candidates, political-party committees, and non-party political committees for the purpose of influencing elections for federal office. Both Congress and this Court have recognized that such limits are an important tool in combating corruption and the appearance of corruption in federal politics. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 27 (1976) (per curiam). Since 1974, federal law has included both (a) base limits on the amount an individual may contribute to particular entities and (b) aggregate limits on the total amount of an individual's contributions. This Court has upheld both against constitutional challenges. *Id.* at 23-35, 38.

a. Amendments to the Hatch Act enacted in 1940, Act of July 19, 1940, ch. 640, § 4, 54 Stat. 770, prohibited the "pernicious political activity" of "directly or indirectly" making "contributions in an aggregate amount in excess of $5,000, during any calendar year" to "any candidate for an elective Federal office" or to "any committee or other organization engaged in furthering, advancing, or advocating the nomination or election of any candidate for any such office or the success of any national political party." The provision's sponsor stated that it was common knowledge that "large contributions to political campaigns * * * put the political party under obligation to the large contributors, who demand pay in the way of legislation." 86 Cong. Rec. 2720 (1940)

(statement of Sen. Bankhead). He expressed his hope that the new provision would help to "bring about clean politics and clean elections." *Ibid.*

The 1940 limit proved "ineffective," however, "because its vague wording permitted it to be interpreted not as an overall limit on an individual's contributions, but as one applying only to contributions made to one committee." Robert E. Mutch, *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law* 66 (1988). Individuals regularly circumvented the limitation by routing contributions in excess of $5000 through multiple committees that supported the same candidate. *Ibid.*; see Louise Overacker, *Presidential Campaign Funds* 36 (1978); *id.* at 42-43 (summarizing spending in the 1944 elections and concluding that "the 'sky was the limit'" for "generous, determined donors"); see also, *e.g.*, Herbert E. Alexander, *Financing Politics: Money, Elections and Political Reform* 86 (1976) (*Financing Politics*) (listing the number of individuals who contributed $10,000 or more in each election cycle from 1952 through 1972, along with the total amounts of their contributions); David W. Adamany & George E. Agree, *Political Money: A Strategy for Campaign Financing in America* 45 (1975) (*Political Money*) (observing that 21 members of a single family contributed $1.8 million in the 1968 elections, an average of more than $85,000 each). Contributors could also give amounts above $5000 to state and local political-party committees, which were exempt from contribution limitations. *Fletcher's Opinion on the Application of Hatch Act*, N.Y. Times, Aug. 4, 1940, at 2.

b. In the early 1970s, Congress substantially overhauled the campaign-finance laws, first by enacting the Federal Election Campaign Act of 1971 (FECA), Pub. L.

No. 92-225, 86 Stat. 3, and then, in the wake of the Watergate scandal, by enacting the Federal Election Campaign Act Amendments of 1974 (1974 FECA Amendments), Pub. L. No. 93-443, 88 Stat. 1263. The concerns that informed the debates on the new campaign-finance laws included concerns that the Hatch Act's $5000 contribution limit was being "routinely circumvented"; that "parties and candidates alike" were "rely[ing] extensively on a few big givers to meet their expanded needs"; and that the best estimates were "that 90 percent of the money raised for political campaigns c[ame] from 1 percent of the contributors." 117 Cong. Rec. 43,410 (1971) (statement of Rep. Abzug); see *id.* at 28,811 (statement of Sen. Prouty) ("[A]n individual can give $5,000 to many separate committees supporting the same candidate."); *id.* at 29,306 (statement of Sen. Pastore) ("The question has been raised time and time again that the trouble was not with the $5,000 limitation, but the idea that you can multiply that $5,000 by many different committees.").

A 1974 congressional report identified multiple instances in which contributions to numerous separate entities had been made at the request of a particular candidate. For example, the dairy industry had avoided then-existing reporting requirements by dividing a $2,000,000 contribution to President Nixon among hundreds of committees in different States, "which could then hold the money for the President's reelection campaign." *Final Report of the Select Committee on Presidential Campaign Activities*, S. Rep. No. 981, 93d Cong., 2d Sess. 615 (1974) (*Final Report*). Shortly thereafter, President Nixon "circumvented and interfered with" the "legitimate functions of the Agriculture Department" by reversing a decision unfavorable to the

dairy industry, and Attorney General John Mitchell (who was also President Nixon's campaign manager) halted a grand-jury investigation of the milk producers' association. *Id.* at 701, 1184, 1205, 1209; see Richard Reeves, *President Nixon: Alone in the White House* 309 (2001) (noting the Secretary of Agriculture's estimate that President Nixon's actions cost the government "about $100 million"). On another occasion, a presidential aide promised an ambassadorship to a particular individual in return for "a $100,000 contribution, which was to be split between 1970 Republican senatorial candidates designated by the White House and [President] Nixon's 1972 campaign." *Final Report* 492. That arrangement was not unique. *Id.* at 501 (describing a similar arrangement with someone else); see *id.* at 493-494 (listing substantial contributions by ambassadorial appointees); see also *Political Money* 39-41 (collecting instances of large contributors "giving and getting"); *Financing Politics* 124-126 (describing contributions that gave the appearance of *quid pro quo* corruption and may have raised "suspicio[ns] about * * * large campaign gifts").

Informed by those findings, the 1974 FECA Amendments included tighter limits on contributions by individuals. The amended law imposed a $1000 base limit on an individual's contributions to any single candidate seeking federal office (or seeking party nomination for such an office), or to a committee controlled by that candidate, with respect to any given election (or set of elections within a single calendar year). § 101(a), 88 Stat. 1263. The amended law also imposed a $25,000 aggregate limit on all contributions by an individual, whether to candidates or other entities, within a single calendar year (with contributions in non-election years

counting towards the limit for the year in which the next election occurred). *Ibid.*

In *Buckley* v. *Valeo*, *supra*, this Court rejected First Amendment challenges to both the base limit and the aggregate limit. 424 U.S. at 23-38. The Court found that the base limit permissibly furthered the government's interest in limiting corruption and the appearance of corruption. *Id.* at 23-35. The Court further concluded that the aggregate limit validly "serve[d] to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Id.* at 38.

c. In 1976, Congress enacted "additional contribution limitations * * * intended to be coextensive with the scope of the $25,000 limitation on contributions by an individual." 122 Cong. Rec. 12,199 (May 3, 1976) (statement of Rep. Hays). In particular, Congress imposed an annual limit of $20,000 on contributions to "political committees established and maintained by a national political party" and an annual limit of $5000 on contributions to any single non-party political committee (commonly known as a "PAC"). Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283 § 112, 90 Stat. 487. Congress also reenacted the $25,000 aggregate limit. *Ibid.* Without that aggregate limit, an individual could, for example, have contributed $5000 each to multiple political committees, which in turn could each have contributed to a candidate, including a candidate to whom the individual himself had already given the maximum contribution of $1000.

Through the use of so-called "soft money," however, candidates and parties were able "to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections." *McConnell* v. *FEC*, 540 U.S. 93, 126 (2003), overruled in part on other grounds by *Citizens United* v. *FEC*, 558 U.S. 310 (2010). Soft money consisted of contributions to political parties that were ostensibly for the purpose of influencing state or local elections, and thus fell outside FECA's contribution limits, which applied only to federal elections. *McConnell*, 540 U.S. at 122-123. As it became clear that activities funded with soft money—such as get-out-the-vote drives, generic party advertising, and even advertisements that mentioned the name of a federal candidate—benefited federal candidates, "the amount of soft money raised and spent by the national political parties increased exponentially," reaching nearly half a billion dollars in 2000. *Id.* at 124. Contributions of soft money "were in many cases solicited by the candidates themselves." *Id.* at 125. It was "not uncommon," for example, for legislators facing reelection to urge supporters who had already contributed the maximum allowable amount to the legislator's campaign to make additional soft-money contributions. *Ibid.*

A 1998 Senate Report determined that "the 'soft money loophole' had led to a 'meltdown' of the campaign finance system that had been intended 'to keep corporate, union and large individual contributions from influencing the electoral process.'" *McConnell*, 540 U.S. at 129 (quoting S. Rep. No. 167, 105th Cong., 2d Sess. 4611, 7515). As this Court later explained, "evidence connect[ed] soft money to manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort re-

form, and tobacco legislation." *Id.* at 149-150. According to former Senator Paul Simon, for example, Federal Express obtained favorable labor-related legislation "not on the merits of the legislation, but just because they had been big contributors," who had given $1.4 million to incumbents and almost $1 million in soft money during the election cycle preceding the vote. *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 482 (D.D.C.) (Kollar-Kotelly, J.), aff'd in part, rev'd in part, 540 U.S. 93 (2003). One Senator emphasized that "we've got to pay attention to who is buttering our bread," and Senator Feingold testified that a colleague urged him to support the legislation because "they just gave us $100,000." *Ibid.*

d. In 2002, Congress passed the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. One of BCRA's "central provisions" closed the soft-money loophole by amending FECA to prohibit national party committees from soliciting or spending soft money and to prohibit state and local party committees from using soft money for federal election activity. *McConnell*, 540 U.S. at 132-134. In conjunction with the soft-money ban, Congress also restructured and increased FECA's contribution limits, including the aggregate contribution limit, and provided for certain automatic future adjustments to account for inflation. BCRA §§ 102, 307, 116 Stat. 86-87, 102-103. Those changes were intended, at least in part, to provide additional lawful avenues for contributions to candidates and party committees, thereby reducing incentives for contributors to make donations through back-door channels. See 148 Cong. Rec. 3615 (Mar. 20, 2002) (statement of Sen. Feinstein) ("The soft money ban will work because we came to a reasonable compromise with re-

gard to raising some of the existing hard money contribution limits by modest amounts, and indexing those limits for inflation."). Concern remained, however, that the limits be maintained at a level that would not allow "large amounts of money to be channeled directly to individual candidates." 147 Cong. Rec. 4634 (Mar. 27, 2001) (statement of Sen. Schumer).

In its current form, and as inflation-adjusted for the 2013-2014 election cycle, FECA's base contribution limits permit an individual to contribute up to $2600 per election (counting primary and general elections separately) to "any candidate and his authorized political committees"; up to $32,400 per year to "the political committees established and maintained by a national political party"; up to $10,000 per year to "a political committee established and maintained by a State committee of a political party"; and up to $5000 per year to "any other political committee." 2 U.S.C. 441a(a)(1)(A)-(D); 2 U.S.C. 441a(c)(1); *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013); see 11 C.F.R. 100.2 (definition of "election"). FECA's aggregate contribution limits, inflation-adjusted for the 2013-2014 election cycle, permit an individual to contribute a total of $123,200 per election cycle. 2 U.S.C. 441a(a)(3)(A) and (B); 78 Fed. Reg. at 8532. An individual can contribute $48,600 to candidates for federal office and their authorized political committees, 2 U.S.C. 441a(a)(3)(A); 78 Fed. Reg. at 8532, and can contribute another $74,600 to non-candidate entities—*i.e.*, national political-party committees, state political-party committees, and non-party political committees—so long as no more than $48,600 of that amount is given to state political parties or non-

party political committees. 2 U.S.C. 441a(a)(3)(B); 78 Fed. Reg. at 8532.

2. Appellants are Shaun McCutcheon and the Republican National Committee (RNC), a national committee of the Republican Party. J.S. App. 1a, 4a-5a. McCutcheon alleges that he would like to make, and the RNC alleges that it would like to receive, contributions that are within FECA's base limits but that would (in combination with other contributions made by McCutcheon) exceed FECA's aggregate limits. *Id.* at 4a-5a. In particular, McCutcheon alleges that during the 2011-2012 election cycle he contributed a total of $33,088 to 16 different federal candidates and wished to contribute $1776 apiece to 12 more candidates. *Ibid.* Those additional contributions would have brought his total candidate contributions to $54,400, which would have exceeded FECA's then-current aggregate limit on such contributions by $8200. *Ibid.*[1]

McCutcheon also alleges that he wished to contribute $25,000 to each of three national political committees established and maintained by the Republican Party: the RNC, the National Republican Senatorial Committee (NRSC), and the National Republican Congressional Committee (NRCC). J.S. App. 5a. Those contributions would have brought his total contributions to non-candidate recipients—which included a $20,000 contribution to the Alabama Republican Party and a $2000 contribution to the Senate Conservatives Fund (a non-party political committee)—to $97,000. That amount would have exceeded FECA's then-current aggregate

---

[1] For the 2011-2012 election cycle, the aggregate limit on contributions to candidates was $46,200, and the aggregate limit on contributions to non-candidate recipients was $70,800. 76 Fed. Reg. 8368, 8369-8370 (Feb. 14, 2011).

limit on contributions to non-candidate entities by $26,200. *Ibid*; see p. 10 n.1, *supra*. McCutcheon additionally alleges a desire to make a similar pattern of contributions in future election cycles. J.S. App. 5a.

3. Appellants filed suit in the United States District Court for the District of Columbia, raising First Amendment challenges to FECA's aggregate contribution limits. J.S. App. 1a, 4a-6a. A three-judge district court—convened pursuant to Section 403(a) of BCRA—denied appellants' request for a preliminary injunction and granted the government's motion to dismiss. *Id.* at 1a-17a.

As an initial matter, the district court rejected appellants' argument that the aggregate contribution limits are subject to strict scrutiny. J.S. App. 6a-9a. The district court recognized that although this Court has applied strict scrutiny to expenditure limits, which restrict the amounts that can be spent directly on political speech, it has not applied strict scrutiny to contribution limits, which instead restrict the sums that can be given to support others' political activity. *Id.* at 6a (citing, *inter alia*, *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2817 (2011)). Rather, the Court has held that contribution limits are "valid as long as they satisfy 'the lesser demand of being closely drawn to match a sufficiently important interest.'" *Ibid.* (quoting *McConnell*, 540 U.S. at 136). The Court has found that less stringent standard to be appropriate because contribution limits "primarily implicate the First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interests in other ways." *Id.* at 8a (citing *Buckley*, 424 U.S. at 22, 28). The district court applied that less stringent standard here, observing that FECA's aggre-

gate limits "do not regulate money injected directly into the nation's political discourse; the regulated money goes into a pool from which another entity draws to fund its advocacy." *Id.* at 9a (citing *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 195-196 (1981) (plurality opinion)).

In applying the governing standard to the aggregate limits at issue here, the district court explained that this Court has identified two important governmental interests that can justify contribution limits: (1) "preventing corruption or the appearance of corruption"; and (2) "preventing circumvention of contribution limits imposed to further [the government's] anti-corruption interest." J.S. App. 9a (citing *Buckley*, 424 U.S. at 26-27, 38). The district court reasoned that, because appellants had not challenged the base contribution limits (*e.g.*, the now-$2600 per election limit on contributions to candidates), the court could "assume [those base limits] are valid expressions of the government's anticorruption interest." *Id.* at 11a. "[T]hat being so," the court concluded, "we cannot ignore the ability of aggregate limits to prevent evasion of the base limits." *Ibid.*

The district court explained that, in *Buckley*, this Court had upheld the aggregate contribution limit in the then-current version of FECA as "no more than a corollary of the basic individual contribution limitation that [the Court had] found to be constitutionally valid." J.S. App. 11a (quoting *Buckley*, 424 U.S. at 38). The district court drew additional support for the constitutionality of the current aggregate contribution limits from this Court's decision in *FEC* v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*), which upheld FECA's restrictions on party expenditures that are coordinated with a candidate. The district court noted, *inter alia*, that the decision in *Colorado II*

had rested largely on the Court's concern that contributions to one entity (a political party) could be used effectively to circumvent the base limits on contributions to another (an individual candidate). J.S. App. 12a (citing *Colorado II*, 533 U.S. at 459). The district court reasoned that the aggregate contribution limits here prevent similar circumvention, which might otherwise occur through schemes such as transfers of contributions between different party committees, with the funds eventually spent in coordination with a single candidate. *Id.* at 12a-13a. The district court stated that it would "follow [this] Court's lead and conceive of the contribution limits as a coherent system" that includes both base limits and aggregate limits, "rather than merely a collection of individual limits stacking prophylaxis on prophylaxis," as appellants contended. *Id.* at 13a.

The district court also rejected appellants' arguments that FECA's aggregate contribution limits are too low. J.S. App. 13a-15a. The district court cited several decisions of this Court for the proposition that "[i]t is not the judicial role to parse legislative judgment about what limits to impose." *Id.* at 13a (citing *Randall* v. *Sorrell*, 548 U.S. 230, 248 (2006) (plurality opinion); *Colorado II*, 533 U.S. at 466; *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000); *Buckley*, 424 U.S. at 30). It further explained, *inter alia*, that "individuals remain able to volunteer, join political associations, and engage in independent expenditures." *Id.* at 15a.

SUMMARY OF ARGUMENT

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court upheld Congress's authority to impose aggregate limits on individual political contributions in order to prevent circumvention of the base limits on contributions to particular candidates, parties, and polit-

ical committees. The aggregate contribution limits in the current version of FECA are not distinguishable in any relevant respect from the aggregate contribution limit that *Buckley* upheld. The holding of *Buckley* thus controls this case, and this Court should adhere to it.

I. The Court in *Buckley* declined to apply strict scrutiny under the First Amendment to either base contribution limits or aggregate contribution limits. The Court recognized that limits on contributions, in contrast to limits on expenditures for direct advocacy, impose only "a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21. The Court also recognized that contributions are only one way among many in which an individual can exercise his associational rights. *Id.* at 22. The Court concluded that contribution limits, including aggregate contribution limits, are constitutional so long as the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25.

Appellants' arguments for strict scrutiny of the aggregate contribution limits at issue here cannot be reconciled with *Buckley*. The burdens imposed by the current aggregate contribution limits are indistinguishable in both kind and degree from the aggregate limit the Court in *Buckley* upheld against a similar First Amendment challenge. *Buckley*'s distinction between regulation of contribution limits and regulation of expenditure limits has provided the structure for constitutional review of campaign-finance laws for nearly 40 years. This Court has expressly reaffirmed it, and Congress has relied upon it, as have numerous state legisla-

tures. Its reasoning remains sound, and overruling it now would disserve important principles of *stare decisis*.

II. In upholding FECA's then-current aggregate contribution limit against a First Amendment challenge, the *Buckley* Court explained that "this quite modest restraint upon protected political activity" was "no more than a corollary" of the base limit on contributions to candidates that the Court had determined to be a permissible anti-corruption measure. 424 U.S. at 38. The Court explained that the aggregate limit "serve[d] to prevent evasion" of that base limit "by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Ibid.* Under the current statutory regime as well, a contributor could potentially funnel massive amounts of money to a favored candidate or set of candidates if the aggregate limits were held to be unconstitutional. The contributor could give $5000 to each of an unlimited number of political committees, each of which could then give money directly or indirectly to particular candidates. 2 U.S.C. 441a(a)(1)(A) and (C). On top of that, the contributor could also give more than $3.6 million to party candidates and to state and national party committees, much of which could be used to support a specific candidate or set of candidates. 2 U.S.C. 439a(a)(4); 441a(a)(1)(B) and (D), (a)(2)(A), (a)(4). Indeed, even if the money were not funneled to a specific candidate or set of candidates, the solicitation and contribution of multi-million dollar sums to support a party's electoral slate (which could be conveyed to a joint funding committee in a single check) can

cause precisely the sort of actual and apparent corruption that Congress is empowered to prevent.

None of Congress's post-*Buckley* amendments to FECA undermines the role of aggregate contribution limits in reducing actual and apparent corruption of the political process. The statutory modifications highlighted by appellants—such as base limits on contributions to political committees and restrictions on affiliated political committees—would not preclude a contributor from carrying out the schemes that FECA's original aggregate contribution limit was intended to prevent. Appellants' other arguments, such as the contention that Congress has no interest in regulating an individual's total contributions so long as each contribution is below the applicable base limit, are analytically unsound and would have applied equally to the aggregate contribution limit upheld in *Buckley*.

ARGUMENT

Appellants do not challenge the constitutionality of FECA's base limits on an individual's contributions to particular candidates, party committees, or other political committees. They instead contend that, notwithstanding the constitutionality of those base limits as anti-corruption measures, the First Amendment prohibits Congress from imposing any limit whatever on the aggregate amount of an individual's contributions. That contention is foreclosed by *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), which held that FECA's aggregate contribution limit is a permissible legislative effort "to prevent evasion" of the base limits. *Id.* at 38.

Appellants cannot meaningfully distinguish the aggregate limits in their current form from the aggregate limit upheld in *Buckley*. They instead seek to relitigate *Buckley*. Appellants directly challenge *Buckley*'s cen-

tral holding that contribution limits are subject to less exacting First Amendment scrutiny than are expenditure limits. And they attack FECA's current aggregate limits on grounds that would necessarily have invalidated the aggregate limit the *Buckley* Court found to be constitutional. Accepting appellants' contentions, and striking down FECA's aggregate limits on campaign contributions, would disserve fundamental principles of *stare decisis*, would be wrong as an original matter, and would invite into the political process the serious harms that the aggregate limits are designed to prevent.

I. THIS COURT SHOULD ADHERE TO *BUCKLEY*'S HOLDING THAT AGGREGATE CONTRIBUTION LIMITS ARE NOT SUBJECT TO STRICT SCRUTINY

A core tenet of this Court's campaign-finance jurisprudence is that "contributions lie closer to the edges than to the core of political expression." *FEC* v. *Beaumont*, 539 U.S. 146, 161 (2003). The Court therefore has consistently treated contribution limits, including aggregate contribution limits, "as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment." *Ibid.* Appellants offer no reason to abandon nearly four decades of well-settled law by applying strict scrutiny for the first time in this case.

A. The Court In *Buckley* Declined To Apply Strict Scrutiny To Contribution Limits, Including Aggregate Contribution Limits

In *Buckley*, this Court upheld the constitutionality of various contribution limits in the 1974 version of FECA, including the base limit of $1000 on contributions by an individual to a candidate and the aggregate limit of $25,000 on total contributions by an individual in any

calendar year. 424 U.S. at 23-38. The Court held that limits on contributions, unlike limits on expenditures, are not subject to strict scrutiny under the First Amendment. Compare, *e.g.*, *id.* at 24-25, with *id.* at 52-54. Under that approach, limitations on contributions are constitutional so long as the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25.

The Court in *Buckley* explained that, "[b]y contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20-21. That is because "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21. While the contribution itself "serves as a general expression of support for the candidate and his views," it "does not communicate the underlying basis for the support," and the "quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Ibid.* Furthermore, although contribution limits "impinge on protected associational freedoms" by "limit[ing] one important means of associating with a candidate or committee," they do not preclude other means of association, and they "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.* at 22.

The Court in *Buckley* reviewed FECA's $25,000 aggregate contribution limit under the lesser standard of

scrutiny applicable to contribution limits, rather than the strict scrutiny applicable to expenditure limits. 424 U.S. at 38. The Court's discussion of the aggregate contribution limit appeared in the section of the opinion entitled "Contribution Limitations," *id.* at 23, 38; the Court consistently referred to the limit as a restriction on "contribution[s]" or on "contributing," see, *e.g.*, *id.* at 7, 13, 34 n.40, 38, 58; and the Court discussed the First Amendment implications of the limit in terms of "associational freedom" rather than freedom of expression, *id.* at 38. At no point did the Court suggest that strict scrutiny should apply.

B. Appellants' Arguments For Applying Strict Scrutiny To Aggregate Contribution Limits Cannot Be Squared With *Buckley*

1. Notwithstanding *Buckley*, the RNC contends (Br. 7-14) that the aggregate contribution limits at issue in this case should be reviewed under a strict-scrutiny standard. That argument is misconceived. Each of the two distinctions the RNC posits between aggregate contribution limits and base contribution limits was equally present in *Buckley*, and neither justifies subjecting the former to more demanding scrutiny than the latter.

First, the RNC asserts (Br. 8) that aggregate contribution limits and base contribution limits "have different justifications." That is not so. The *Buckley* Court described the aggregate limit as a "corollary" of a base limit that "serves to prevent evasion" of that base limit. 424 U.S. at 38. The Court thus recognized that aggregate contribution limits are designed to further the same ultimate anti-corruption objective as limits on contributions to particular federal candidates.

Second, the RNC asserts (Br. 9) that, "while base limits restrict how much one may contribute to particular [entities], aggregate limits restrict how many such entities one may support at the full-base-limit amount" (emphasis omitted). The RNC's focus on how many contributions an individual can make "at the full-base-limit amount" is misplaced. The Court explained in *Buckley* that "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support." 424 U.S. at 21. Rather, because "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution," the expressive value of a contribution "rests solely on the undifferentiated, symbolic act of contributing." *Ibid.* Under the current FECA framework, as at the time of *Buckley*, an individual can engage in the "symbolic act of contributing" to as many entities as he wishes.

Indeed, McCutcheon has not alleged in this case that he wished to contribute the full base-limit amount to any additional candidate or political committee. J.S. App. 4a-5a. Because McCutcheon's total contributions to candidates in the 2011-2012 election cycle were $13,112 less than the applicable aggregate limit, he could have contributed an additional $1092 to each of the 12 additional candidates that he allegedly wished to support. *Id.* at 4a-5a; p. 10 & n.1, *supra*.[2] McCutcheon does not suggest that the additional $684 he wished to contribute to each of those candidates would have meaningfully enhanced the candidate's electoral prospects or ability to communicate his message. To the contrary, McCut-

---

[2] McCutcheon also did not reach the limit on contributions to non-candidate entities, and thus could have made more of those contributions as well. J.S. App. 4a-5a; pp. 10-11 & n.1, *supra*.

cheon asserts that even a contribution at the full base-limit amount "is likely to be only a small—potentially even miniscule—fraction of the recipient's overall assets." Br. 51. Rather, McCutcheon simply wishes to place on each contribution check a number (1776) that is of particular significance to him and to this Nation. His inability to utilize that additional symbolism, over and above the "symbolic act of contributing" (*Buckley*, 424 U.S. at 21), is of marginal First Amendment significance.

Unlike expenditure limits, and like base contribution limits, aggregate contribution limits do not "reduce the total amount of money potentially available to promote political expression." *Buckley*, 424 U.S. at 22. Instead, they "merely * * * require candidates and political committees to raise funds from a greater number of persons" and "compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Ibid.* Aggregate contribution limits therefore do not seek to level the political playing field or correct for any possible distorting effects of speech on the electorate. In no sense do aggregate limits "reduce the greater potential voice of affluent persons and well-financed groups," who "remain free to spend unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters." *Id.* at 26 n.26.

An individual's ability to influence public debate through means other than contributions to candidates and parties is even greater now than it was when *Buckley* was decided. Under the D.C. Circuit's recent decision in *SpeechNow.org* v. *FEC*, 599 F.3d 686 (en banc), cert. denied, 131 S. Ct. 553 (2010), an individual is constitutionally entitled not only to spend as much as he

desires on his own campaign-related speech, but also to donate unlimited sums to advocacy groups that make only "independent expenditures," which are not coordinated with a candidate or a political party. See *id.* at 696; see also 2 U.S.C. 431(17) (defining "independent expenditure"). During the 2011-2012 election cycle, McCutcheon spent more than $300,000 in support of two independent-expenditure-only PACs (commonly known as "super PACs") that he established. See FEC, *Transaction Query By Individual Contributor*, http://www.fec.gov/finance/disclosure/norindsea.shtml (last visited July 17, 2013). One of those super PACs spent nearly $135,000 supporting and opposing candidates. See FEC, *Committees And Candidates Supported/Opposed: Conservative Action Fund*, http://query.nictusa.com/cgi-bin/com_supopp/C00496505 (last visited July 17, 2013).[3]

McCutcheon was entirely free to spend even more on his independent-advocacy endeavors had he wished to. Nor would federal law have restricted McCutcheon from donating his time and energy to assist and associate with electoral candidates. See *Buckley*, 424 U.S. at 22. As was true when *Buckley* was decided, FECA in its current form expressly excludes volunteer work from the definition of "contribution." *Id.* at 183; 2 U.S.C.

---

[3] Some of appellants' amici suggest (see, *e.g.*, Cato Inst. Amicus Br. 14-15) that court decisions invalidating certain limits on donations to advocacy groups give such groups a fundraising advantage over candidates, and that this disparity should be remedied through more demanding First Amendment scrutiny of limits on contributions to candidates. That suggestion is misguided. Advocacy groups can as easily support a candidate as oppose a candidate; contributions to candidates present corruption concerns that contributions to advocacy groups do not; and Congress is not required to level the playing field to assure that candidates (or parties) can raise the same amount of money as advocacy groups.

431(8)(B)(i). Advances in communication technology—including cheaper long-distance telephone calls, the invention of the Internet, and the rise of social media—make volunteering for and participating in geographically distant campaigns much easier now than it was when *Buckley* was decided.

2. McCutcheon does not explicitly endorse the RNC's view that *Buckley* would permit courts to scrutinize aggregate contribution limits more closely than base contribution limits. He contends (Br. 24-31), however, that aggregate contribution limits are uniquely burdensome. His arguments—which, to a significant extent (see, *e.g.*, *id.* at 24-26), proceed from the erroneous premise that aggregate contribution limits restrict the number of entities to which an individual can contribute—are misconceived.

McCutcheon contends (Br. 28-31) that aggregate contribution limits burden First Amendment rights by creating competition within a single political party for a contributor's dollars. The Court in *Buckley*, however, rejected the proposition that "merely * * * requir[ing] candidates and political committees to raise funds from a greater number of persons" would "have any dramatic adverse effect on the funding of campaigns and political associations." 424 U.S. at 21-22. Nor does McCutcheon offer any reason to suppose that FECA's aggregate contribution limit will induce candidates and committees within a single political party to compete for permissible contributions by disparaging each other in a way that muddles the party's message. To the contrary, by authorizing candidates and party committees to contribute to each other, see 2 U.S.C. 439a(a)(4); 441a(a)(1)(B) and (D), (a)(2)(A), (a)(4), federal campaign-finance law estab-

lishes much greater incentives to intra-party cooperation than to destructive internecine competition.

McCutcheon also contends (Br. 25-26) that aggregate contribution limits are especially burdensome because contributions "are the only realistic way to meaningfully and publicly demonstrate support for, associate with, and assist a variety of candidates and state parties" in different parts of the country. See also RNC Br. 13. As discussed above, however, aggregate contribution limits do not preclude a contributor from contributing to as many candidates, parties, and other committees as he desires. They instead limit only the average amount of the contributions when a particular donor wishes to support so many recipients that he cannot contribute the full base-limit amount to all of them. See pp. 20-21, *supra*; *Buckley*, 424 U.S. 21, 38.

McCutcheon's reliance (Br. 26-28) on *Davis* v. *FEC*, 554 U.S. 724 (2008), and *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806 (2011) (*AFECFCP*), is likewise misplaced. In both of those decisions, the Court invalidated laws that sought to level the playing field by allowing a candidate's opponents to receive more money (either through contributions or public financing) when expenditures in support of a candidate (either by the candidate himself or by independent advocacy groups) reached a certain level. *Davis*, 554 U.S. at 728-732; *AFECFCP*, 131 S. Ct. at 2813. The constitutional burden the Court identified in each case was that the laws effectively penalized independent expenditures, and the laws were thus subject to strict scrutiny. *Davis*, 554 U.S. at 737-744; *AFECFCP*, 131 S. Ct. at 2816-2824. The restrictions at issue here, by contrast, are on contributions rather than expenditures—a type of restriction this Court has long viewed as "less

onerous" and warranting "a lower level of scrutiny." *AFECFCP*, 131 S. Ct. at 2817.[4]

C. Appellants Provide No Sound Reason To Overrule *Buckley*'s Longstanding Distinction Between Contribution Limits And Expenditure Limits

Appellants alternatively suggest (*e.g.*, RNC Br. 14, McCutcheon Br. 32 & n.17) that the Court should overrule *Buckley* and subject all contribution limits to strict scrutiny. That suggestion contravenes sound principles of *stare decisis* and has little to recommend it as a matter of First Amendment law.

1. In the nearly four decades since *Buckley*, this Court has consistently reaffirmed the foundational distinction between expenditure limits (which are subject to strict scrutiny) and contribution limits (which are not). See, *e.g.*, *AFECFCP*, 131 S. Ct. at 2817; *Davis*, 554 U.S. at 737; *McConnell* v. *FEC*, 540 U.S. 93, 134-138 (2003), overruled in part on other grounds by *Citizens United* v. *FEC*, 558 U.S. 310 (2010); *Beaumont*, 539 U.S. at 161-162; *FEC* v. *Colorado Republican Fed. Campaign Committee*, 533 U.S. 431, 440 (2001); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-388 (2000); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986). That distinction reflects the "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be

---

[4] Other decisions on which McCutcheon relies likewise did not address contribution restrictions. See *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208 (1986) (restriction on open primaries); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (restriction on corporate independent expenditures).

spent on his campaign." *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985).

Contrary to the RNC's suggestion (Br. 13), neither *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290 (1981), nor *Randall* v. *Sorrell*, 548 U.S. 230 (2006), suggests that strict scrutiny would apply to contribution limits in the context of federal-candidate elections. In *Citizens Against Rent Control*, the Court recognized that restrictions on contributions to committees that support state ballot measures affect First Amendment rights differently than do the restrictions on contributions for federal-candidate elections at issue in *Buckley* and here. 454 U.S. at 296-297. In *Randall*, where the Court held that particular state limits on contributions to candidates were unconstitutionally low, the plurality opinion applied the First Amendment framework set forth in *Buckley*. 548 U.S. at 241-242, 246-247. This Court has never viewed either decision as applying strict scrutiny to contribution limits, or as undermining "the careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech." *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring).

2. The rationale for that "careful line" is as sound now as it was when *Buckley* was decided. Particularly because individuals and corporations can now spend unlimited amounts on independent speech in support of favored candidates, contribution limits continue to leave "communication significantly unimpaired." *Shrink Mo. Gov't PAC*, 528 U.S. at 387. Compared to such independent expenditures, or to other direct activities such as speaking or volunteering on a candidate's behalf, the expressive value of a contribution—which funds someone else's speech—is limited. See, *e.g.*, *McConnell*, 540

U.S. at 135. And while a contribution "serves as a general expression of support for the candidate and his views, * * * [t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution." *Buckley*, 424 U.S. at 21.

This Court's post-*Buckley* precedents have also recognized other reasons, in addition to "the limited burdens they impose on First Amendment freedoms," for declining to apply strict scrutiny to contribution limits. *McConnell*, 540 U.S. at 136. The Court's longstanding approach "reflects the importance of the interests that underlie contribution limits—interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'" *Ibid.* (quoting *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 208 (1982)). "Because the electoral process is the very means through which a free society democratically translates political speech into concrete governmental action, contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate." *Id.* at 137 (internal quotation marks and citation omitted). Applying a "less rigorous standard of review" both "shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise" and "provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *Ibid.*

Less stringent scrutiny of contribution limits is also appropriate because such limits are analogous to other anti-corruption measures of unquestioned constitution-

ality. Federal law contains "an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." *United States* v. *Sun-Diamond Growers*, 526 U.S. 398, 409 (1999). Executive Branch officials, for example, are barred (subject to limited exceptions) from soliciting or receiving any gift "[g]iven because of the employee's official position." 5 C.F.R. 2635.202(a)(2). Such restrictions serve to prevent actual and apparent corruption of the federal work force and to ensure that federal officers and employees bear undivided loyalty to their public employer. See, *e.g.*, *Crandon* v. *United States*, 494 U.S. 152, 165 (1990).

The anti-corruption rationale for limits on campaign contributions, accepted by this Court in *Buckley* and its progeny, closely resembles the long-accepted bases for more sweeping restrictions on the receipt by public officials of payments and gifts from persons outside the government. See *Shrink Mo. Gov't PAC*, 528 U.S. at 390. Outside the context of electoral campaign contributions, it is uncontroversial that persons who wish to register their approval of official actions cannot do so by giving money to federal personnel. The existing FECA regime is not a unique constraint on the use of money to express political views or achieve political objectives, but instead represents a pragmatic effort to achieve goals like those that underlie federal anti-corruption and conflict-of-interest laws, while allowing federal candidates to obtain the funds needed to wage vigorous electoral campaigns. Federal campaign-finance laws balance those objectives by allowing contributions far in excess of the (essentially *de minimis*) value of the gifts federal officials can otherwise receive, subject to the

condition (see 2 U.S.C. 439a) that the funds not be converted to personal use.

To be sure, contribution limits could impede political speech if they were set so low as to "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21; see *Randall*, 548 U.S. at 248 (plurality opinion); *Shrink Mo. Gov't PAC*, 528 U.S. at 397. Appellants do not contend, however, that either the FECA contribution limits generally, or the limits on aggregate contributions in particular, are likely to have that effect. Any such contention would be implausible, since federal candidates spent more than $3 billion, and parties more than $2 billion, in the 2012 election cycle. FEC, *2011-2012 Election Cycle: Total Disbursements by Entity Type*, http://www.fec.gov/law/2012TDbyEntity.shtml (last visited July 17, 2013).

3. In any event, "[w]hether or not" the Court today "would agree with" *Buckley*'s "reasoning and its resulting rule" in the first instance, "principles of *stare decisis* weigh heavily against overruling it now." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). Although "*stare decisis* is not an inexorable command, * * * even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *Ibid.* (internal quotation marks and citations omitted). If "mere demonstration that [an] opinion was wrong" were sufficient to justify overruling it, the doctrine of *stare decisis* "would be no doctrine at all." *Hubbard* v. *United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment).

Overruling *Buckley* now would severely disrupt the considerable reliance interests that have accrued over

the last four decades. The outcome of a number of this Court's important campaign-finance precedents would be cast into doubt. See, *e.g.*, *Beaumont*, 539 U.S. at 162 (observing that the contribution/expenditure dichotomy "is the only practical way to square two leading cases," *National Right to Work Comm.*, *supra* and *Massachusetts Citizens for Life Inc.*, *supra*); see also *McConnell*, 540 U.S. at 138 n.40 (citing cases applying "less rigorous" scrutiny to contribution limits). Congress and state legislatures, which have enacted numerous campaign-finance laws in reliance on *Buckley*, would no longer have any assurance that those laws are constitutional. See, *e.g.*, *McConnell*, 540 U.S. at 137 (observing that "in its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny"); National Conference of State Legislatures, *Contribution Limits: An Overview*, http://www.ncsl.org/legislatures-elections/elections/campaign-contribution-limits-overview.aspx (last visited July 17, 2013) (reporting that 46 States have some form of contribution limits). And legislatures and lower courts would have little practical guidance about how to proceed going forward. See *Hubbard*, 514 U.S. at 714 (opinion of Stevens, J.) (observing that *stare decisis* "has special force when legislators or citizens have acted in reliance on a previous decision, for in th[at] instance overruling the decision would * * * require an extensive legislative response") (internal quotation marks and citation omitted).

Appellants identify no justification for such massive upheaval in this important area of law. This Court's repeated reliance on *Buckley* has not only reinforced *Buckley*'s centrality but also demonstrated its workabil-

ity. Ten years ago, this Court concluded that *stare decisis*, "buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide * * * powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided." *McConnell*, 540 U.S. at 137-138; see *Randall*, 548 U.S. at 243-246 (opinion of Breyer, J., joined by Roberts, C.J.) (likewise relying on *stare decisis* in respect to *Buckley*'s distinction between contributions and expenditures). Since *McConnell*, an additional decade of judicial and legislative reliance on this Court's decision in *Buckley* has reinforced that conclusion.

II. THIS COURT SHOULD ADHERE TO *BUCKLEY*'S HOLDING THAT AGGREGATE CONTRIBUTION LIMITS ARE CONSTITUTIONAL

Buckley controls not only the level of scrutiny that should apply in this case, but also the result of its application. The aggregate contribution limits in the current version of FECA cannot be distinguished in any meaningful way from the aggregate contribution limit upheld in *Buckley*.

A. The Court In *Buckley* Upheld FECA's Base And Aggregate Contribution Limits As Valid Measures To Help Prevent Actual And Apparent Corruption

Applying the reduced degree of scrutiny appropriate to contribution limits, the Court in *Buckley* rejected First Amendment challenges to both the base and aggregate contribution limits in the then-current version of FECA. 424 U.S. at 23-38. The Court held that the contribution limits permissibly furthered the important governmental interests of preventing "the actuality and appearance of corruption resulting from large individual

financial contributions." *Id.* at 26 (discussing base limits); see *id.* at 38 (finding aggregate limits to be "no more than a corollary" of the base limits); see also *McConnell*, 540 U.S. at 298 (Kennedy, J., concurring in the judgment in part and dissenting in part) (observing that *Buckley* recognized Congress's "interest in regulating the appearance of corruption that is 'inherent in a regime of large individual financial contributions'") (quoting *Buckley*, 424 U.S. at 27).

The Court specifically identified two "weighty interests * * * sufficient to justify" the then-current $1000 limit on individual contributions to candidates. *Buckley*, 424 U.S. at 29. First, the limit reduced the opportunity for individuals to use large contributions "to secure a political *quid pro quo* from current and potential office holders." *Id.* at 26. While acknowledging that "the scope of such pernicious practices can never be reliably ascertained," the Court observed that "the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one." *Id.* at 27. The Court also recognized that "the integrity of our system of representative democracy is undermined" by such corrupt arrangements. *Id.* at 26-27.

Second, and "[o]f almost equal concern," the limit reduced "the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27. The Court recognized that "the reality or appearance of corruption" would be "inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed." *Id.* at 28. "Congress," the Court reasoned, "could legitimately conclude that the avoidance of the appearance of

improper influence is * * * critical, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* at 27 (internal quotation marks, ellipsis, and citation omitted). The base contribution limits furthered that goal by "focus[ing] precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Id.* at 28.

Turning to the $25,000 aggregate contribution limit, the Court found this "limited, additional restriction on associational freedom" to be "no more than a corollary of the basic individual contribution limitation" that the Court had "found to be constitutionally valid." *Buckley*, 424 U.S. at 38. The Court recognized that the "overall $25,000 ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." *Ibid.* It concluded, however, that "this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Ibid.*

B. FECA's Current Aggregate Contribution Limits Serve The Same Important Purposes As The Aggregate Contribution Limit Upheld In *Buckley*

Appellants in this case raise a very particularized challenge to FECA's current aggregate contribution limits. They do not dispute that FECA's base limits on contributions to candidates, party committees, and other political committees are permissible measures to combat corruption and the appearance of corruption. See *AFECFCP*, 131 S. Ct. at 2825 ("Limiting contributions * * * is the primary means we have upheld to combat corruption."). They also do not dispute the general proposition—reaffirmed after *Buckley*—that the government's interests in combating corruption and its appearance can be "sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits." *McConnell*, 540 U.S. at 144; see *Colorado II*, 533 U.S. at 456 ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption."); see, *e.g.*, RNC Br. 16; McCutcheon Br. 40. And they do not expressly renew in this Court the challenge they raised in the district court to the precise dollar amounts of the aggregate contribution limits in the current version of FECA. Compare J.S. ii (raising that issue in a separate question presented), with RNC Br. i (failing to do so); McCutcheon Br. i (same).[5]

---

[5] The RNC adverts to this argument in passing (*e.g.*, Br. 55 & n.43), but makes no sustained attempt to support it. In any event, the argument lacks merit for reasons explained in the government's motion to dismiss or affirm. See Mot. to Dismiss or Affirm 21-24. This Court has "ordinarily * * * deferred to the legislature's determination of" exact dollar figures for contribution limits, recognizing that a "legislature is better equipped to make such empirical judgments" based on legislators' "particular expertise in matters related to the costs

Rather, appellants' basic argument is that no conceivable level of aggregate contribution limits in the current version of FECA could be justified as a constitutionally valid anti-corruption or anti-circumvention measure. *Buckley* forecloses that contention. Without a ceiling on aggregate contributions, contributors now could do exactly what the *Buckley*-era aggregate limit permissibly prevented: "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38.

1. A particularly effective circumvention technique, both when *Buckley* was decided and today, would be to contribute money to many different entities, each of which could then make its own contribution to the candidate. The individual could contribute up to $5000 apiece to numerous non-party political committees, 2 U.S.C. 441a(a)(1)(C), which could each in turn contribute at least $2600 during the primary, and another $2600 during the general election, to a single candidate, 2

---

and nature of running for office." *Randall*, 548 U.S. at 248 (plurality opinion) (internal quotation marks and citation omitted); see, *e.g.*, *Davis*, 554 U.S. at 737 ("When contribution limits are challenged as too restrictive, we have extended a measure of deference to the judgment of the legislative body that enacted the law."). The Court has, in particular, rejected the proposition that *Buckley* "set a minimum constitutional threshold for contribution limits," explaining that "the dictates of the First Amendment are not mere functions of the Consumer Price Index." *Shrink Mo. Gov't PAC*, 528 U.S. at 396-397. Rather, an otherwise-permissible contribution limit will be set aside as unduly low only if its practical effect is "to impede the ability of candidates to 'amas[s] the resources necessary for effective advocacy.'" *Id.* at 397 (quoting *Buckley*, 424 U.S. at 21). Appellants do not and could not plausibly contend that the aggregate contribution limits at issue here have that effect. See p. 29, *supra*.

U.S.C. 441a(a)(1)(A) and (2)(A) (multicandidate political committees can contribute $5000 per candidate per election); 78 Fed. Reg. at 8532; see 2 U.S.C. 431(11). The political committee could also route the funds to the candidate's benefit more indirectly, by contributing to party or non-party committees that could then make their own contributions to the candidate. 2 U.S.C. 441a(a)(1)(B)-(D); 78 Fed. Reg. at 8532 (political committees can contribute $32,400 apiece to each national-party committees, $10,000 apiece to each state party committee, and $5000 apiece to other non-party political committees); 2 U.S.C. 441a(a)(2)(B)-(C) (multicandidate political committees can contribute $15,000 apiece to national-party political committees, and $5000 to other political committees).

The use of political committees as conduits for contributions to candidates is even easier now than it was when *Buckley* was decided. First, more than five times as many political committees exist today as in 1976. FEC, *PAC Count—1974 to Present*, Jan. 2013, http://www.fec.gov/press/summaries/2011/2011paccount.shtml (listing 1146 political committees as of Dec. 31, 1976, and 6331 as of Jan. 1, 2013). Second, it is much simpler today than in 1976 to determine which political committees are "likely to contribute to" a particular candidate, *Buckley*, 424 U.S. at 38, since many committees provide that information on their websites. See, *e.g.*, American Legacy PAC, *Who We Support*, http://www.americanlegacypac.org/who-we-support (last visited July 17, 2013) (listing one federal candidate for 2013 election cycle and one federal candidate for 2014 election cycle); Young Americans for Liberty, *YAL PAC*, http://www.yaliberty.org/pac (last visited July 17, 2013) (listing 12 candidates for 2012 election cycle). A donor's

ability to use committees as conduits in this way would be limited only by his own resources and the number of such committees that support candidates he wishes to support—and such committees can be expected to proliferate further in number if aggregate contribution limits are invalidated.

2. Even putting non-party committees to one side, an individual could still contribute a "massive" (*Buckley*, 424 U.S. at 38) $3,628,000 in a single two-year election cycle to entities affiliated with a single party: $2,262,000 to candidates for the House of Representatives ($2600 to each of 435 candidates at both the primary and general-election stages); $171,600 to Senate candidates ($2600 to each of 33 candidates at both the primary and general-election stages); $1,000,000 to state party committees ($10,000 per year to each of 50 committees); and $194,400 to national party committees ($32,400 per year to each of three committees). 2 U.S.C. 441a(a)(1)(A)-(D); 78 Fed. Reg. at 8532. Indeed, as the district court observed (J.S. App. 12a), the contributor could accomplish much of this with a single check. Candidates, the national party committees, and their state party affiliates could simply form a "joint fundraising committee," which could then receive a lump-sum contribution of hundreds of thousands or millions of dollars to be parceled out in base-limit-compliant pieces to the various party-affiliated entities. See *ibid.*; see, *e.g.*, 11 C.F.R. 102.6(b)-(c), 102.17.

These entities would then have considerable discretion to funnel most or all of this money to a narrow set of candidates. National and state party committees, for example, can each contribute $5000 apiece to candidates. 2 U.S.C. 441a(a)(2)(A) and (4); see 11 C.F.R. 110.3(b)(3). Those committees can also each direct additional

amounts towards coordinated expenditures, *i.e.*, expenditures made "in cooperation, consultation, or concert with" a candidate's campaign. 2 U.S.C. 441a(a)(7)(B)(i); see 2 U.S.C. 441a(d)(3). This Court has found "no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate," and it has treated coordinated expenditures like contributions for constitutional purposes. *Colorado II*, 533 U.S. at 464; see *id.* at 447-465. In the current election cycle, the coordinated expenditure limits for national and state party committees allow for $46,600 in coordinated expenditures on behalf of each House candidate in States with more than one representative, and between $93,100 and $2,682,200 (depending on state population) in coordinated expenditures on behalf of each Senate candidate (or House candidate in States with a single representative). 2 U.S.C. 441a(d)(3); 78 Fed. Reg. at 8531-8532.

Candidates themselves can contribute up to $2600 apiece per election to other candidates (2 U.S.C. 441a(a)(1)(A); 78 Fed. Reg. at 8532), and the authorized campaign committee of each candidate can contribute another $2000. 2 U.S.C. 432(e)(3)(B). Appellants do not appear to dispute that such transfers take place, and FEC data show that candidates in "safe" districts regularly contribute campaign funds to candidates in their party who face more difficult elections. See generally FEC, *Detailed Files About Candidates, Parties and Other Committees*, http://www.fec.gov/finance/disclosure/ftpdet.shtml (last visited July 17, 2013); FEC, *Disclosure Data Catalog*, http://www.fec.gov/data/DataCatalog.do?cf=downloadable (last visited July 17, 2013). In particular, FEC data reveal that in the 2011-2012 election cycle, federal candidates collectively con-

tributed more than $11 million to other federal candidates, including 77 transactions totaling $104,268 to Rep. Louise Slaughter (New York's 25th District); 71 transactions totaling $100,500 to Rep. John Tierney (Massachusetts's 6th District); 76 transactions totaling $100,106 to former Rep. Francisco Raul Canseco (Texas's 23rd District); 59 transactions totaling $97,799 to Sen. Joe Donnelly (Indiana); 78 transactions totaling $97,500 to Rep. Kathy Hochul (New York's 26th District); 73 transactions totaling $94,500 to former Rep. Betty Sutton (Ohio's 13th District); and 71 transactions totaling $93,500 to former Rep. Mark Critz (Pennsylvania's 12th District). Officeholders today have additionally established hundreds of "leadership PACs" dedicated to spending funds in support of their colleagues, which raised more than $138 million in the 2011-2012 election cycle, and to which candidate committees themselves can contribute. FEC, *2012 Leadership PACs and Sponsors*, http://www.fec.gov/data/Leadership.do?format=html&election_yr=2012 (last visited July 17, 2013).

Candidates can also transfer funds without limit to national and state party committees. 2 U.S.C. 439a(a)(4); 11 C.F.R. 113.2(c). Those party committees can in turn transfer funds without limit among each other, 2 U.S.C. 441a(a)(4), and then potentially use the funds for candidate contributions or for coordinated expenditures. See *McConnell*, 540 U.S. at 124 (noting transfers from national to state parties); *id.* at 161 ("BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit."); *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 30 (1981) (describing system of state parties giving national parties control over state party's spending).

3. A system in which an individual can provide millions of dollars—potentially in response to direct solicitations from the President and Members of Congress—to finance parties and their candidates would substantially replicate the Watergate-era and soft-money systems that resulted in well-documented instances of actual or apparent corruption and circumvention of existing law. See *Buckley*, 424 U.S. at 26-27 & n.28; *McConnell*, 540 U.S. at 129-131, 145-152. Political candidates and parties could become increasingly dependent on the largesse of a small number of donors willing to underwrite the cost of campaigns. As *Buckley* recognized, "public awareness the opportunities for abuse inherent" in such a regime would have a disastrous effect on the public's confidence in our system of representative government. 424 U.S. at 27.

Congress is entitled to conclude that an individual who makes contributions of a magnitude that the aggregate limits would currently prevent might acquire actual or perceived "improper influence," *Buckley*, 424 U.S. at 27, over a party's elected officials, regardless of how the money is spent. As the aforementioned practices of candidate-to-candidate contributions and leadership PACs illustrate, a candidate's political prospects are intertwined with the prospects of his party and its other candidates. An improper arrangement between a contributor and a candidate can thus involve not only contributions to the candidate himself, but also contributions to his party or to other party candidates. For example, the Senate Report accompanying the 1974 FECA Amendments detailed how contributors were promised ambassadorships in return for contributions not just to the President, but to the President's favored Senate candidates as well. *Final Report* 492, 501. Simi-

larly, large soft-money donations to national and state parties have directly affected legislative outcomes in areas such as generic-drug regulation, tort reform, tobacco regulation, and labor relations. See *McConnell*, 540 U.S. at 149-150; pp. 7-8, *supra*.

In upholding the ban on soft-money contributions, the Court in *McConnell* recognized that the "close connection" and "alignment of interests" between candidates and parties meant that "soft-money contributions to national parties [were] likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds [were] ultimately used." 540 U.S. at 155; see *id.* at 155-156. A single donor's large aggregate contributions to a political party and the party's candidates could be expected to give rise to similar indebtedness. Indeed, "there is no meaningful separation between the national party committees and the public officials who control them," because the "national committees of the two major parties are both run by, and largely composed of, federal officeholders and candidates." *Id.* at 155 (internal quotation marks and brackets omitted).

The principle that payments made to a surrogate may have the same corruptive effect as payments made directly to a federal official is a fundamental tenet of many federal anti-corruption and conflict-of-interest laws. The federal criminal prohibition against the payment and receipt of bribes and illegal gratuities, for example, encompasses payments made to a third party designated by the relevant federal official, so long as the requisite connection between the payment and official action is present. See 18 U.S.C. 201(b)(1). Ethics regulations for Executive Branch employees likewise provide that the "gift[s]" subject to the regulatory restrictions include

gifts "[g]iven to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee." 5 C.F.R. 2635.203(f)(2). Senate Rule 35(b)(2)(A) is to the same effect. The evident premise of all those prohibitions is that a federal officer or employee will feel a natural affinity of interests with an organization with which he is closely affiliated. Congress is entitled to reach that same conclusion with respect to candidates for federal office (many of whom are already incumbent officeholders).

4. The absence of aggregate contribution limits would also enable and encourage contributors to give money to candidates and parties irrespective of whether the recipients' ideology aligns with the contributor's. See *McConnell*, 540 U.S. at 148 (noting frequency with which particular donors made soft-money contributions to both parties, "leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology"). Some lobbyists have acknowledged that they currently rely on the aggregate limits to avoid "shakedown[s]" for contributions. Kevin Bogardus, *Lobbyists Fear Shakedown If Supreme Court Lifts Campaign Contributions Cap*, The Hill, Feb. 26, 2013, http://thehill.com/business-a-lobbying/284817-lobbyists-fear-shakedown-if-court-lifts-campaigncap#ixzz2M23oRhX0. Without any aggregate limits, donors could feel pressured not only to contribute more to the candidates and parties they favor, but also to hedge their bets by contributing to competing candidates and parties as well. See *ibid.* (describing comments of a former FEC chairman that removing the aggregate contribution limits would allow donors to contribute $32,400 apiece to all

three national committees of each major party). The current aggregate limits are the only measure that prevents, for example, an individual from contributing the full base limit, in both the primary and general elections, to each of the 51 members of the powerful House Appropriations Committee (a total contribution of $265,200). See U.S. House of Representatives, Committee on Appropriations, *Full Committee Members*, http://appropriations.house.gov/about/members (last visited July 17, 2013).

C. *Buckley* Forecloses Appellants' Challenge To The Aggregate Limits In The Current Version of FECA

Appellants contend that post-*Buckley* amendments to FECA have undermined the original justification for the statute's aggregate contribution limit. That argument is unpersuasive, and appellants' remaining arguments are inconsistent with *Buckley*.

1. *The current version of FECA has not changed in any relevant way from the version considered in* Buckley

Appellants do not explicitly argue that the Court in *Buckley* erred in upholding the aggregate contribution limit in effect at that time. They instead contend that the overall statutory scheme has changed so substantially since 1976 that the justification on which *Buckley* relied to uphold that limit no longer applies. That argument is misconceived.

a. The RNC notes (Br. 22) that, after *Buckley*, Congress prohibited candidates from putting campaign funds to personal use. But the *Buckley* Court's conclusion that FECA's aggregate contribution limit was constitutional did not depend on the possibility that candidates could use campaign funds for personal expenses. See 424 U.S. at 38. And, by accepting the validity of the

current base contribution limits, appellants effectively concede that a contribution to a candidate has the potential to cause actual or apparent corruption even if the candidate cannot convert the funds to personal use.

b. Appellants contend (RNC Br. 39-41; McCutcheon Br. 42-43, 49-50) that the government's anti-corruption and anti-circumvention interests are adequately protected by FECA's "earmarking" provision, 2 U.S.C. 441a(a)(8). Under that provision, a contribution to one entity (*e.g.*, a political committee) earmarked for transfer to a second entity (*e.g.*, a candidate) is treated as a contribution to that second entity for purposes of the original contributor's base contribution limits (*e.g.*, the $2600 limit on contributions to a particular federal candidate). *Ibid.* FECA's earmarking provision, however, already existed when *Buckley* was decided. 424 U.S. at 190 (appendix reproducing 18 U.S.C. 608(b)(6)); see *id.* at 23-24 (discussing earmarking). The Court in *Buckley* specifically recognized that aggregate limits serve the permissible interest of preventing circumvention of the base limits "through the use of *unearmarked* contributions." *Id.* at 38 (emphasis added).

Appellants' argument is also foreclosed by this Court's decision in *Colorado II*, which rejected the contention that the earmarking provision constitutes "the outer limit of acceptable tailoring" in support of the government's anti-corruption and anti-circumvention interests. 533 U.S. at 462. The Court in *Colorado II* explained that such a contention "ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions," which can include various informal ways for political-party contributors to indicate how they want their money spent, and which make circumvention "very hard to trace."

Ibid.; see *id.* at 459 (describing "tally system," through which political parties helped channel funds from contributors to candidates while avoiding formal earmarking).[6]

Before BCRA's restrictions on soft money were enacted, contributors frequently "create[d] debt on the part of officeholders" through massive donations to parties, notwithstanding anti-earmarking laws and the absence of any formal mechanism for assuring that a particular contribution would benefit a particular candidate. *McConnell*, 540 U.S. at 146. Even without earmarking, contributors can accurately determine how their contributions will be used. Party committees, like other political committees, frequently focus on particular candidates. For example, more than 96% of the nearly $210,000 in coordinated expenditures by the Democratic Party of New Mexico in 2012 was in support of a single candidate, and the entirety of the $334,604 in coordinated expenditures by the Missouri Democratic State Committee in 2012 was in support of a single candidate.[7] Even in contexts where contributions are not

---

[6] Contrary to the RNC's assertion (Br. 41-42), the FEC has not conceded that such tallying lacks corrupting potential. The RNC relies on a three-sentence letter sent by the FEC to the Democratic Senatorial Campaign Committee (DSCC) in 2012, following up on an FEC enforcement action from the 1990s. To resolve that enforcement action, the DSCC admitted that its use of a tally system violated an FEC regulation (11 C.F.R. 110.6(c)(2)), paid a fine, and entered into a conciliation agreement. Conciliation Agreement, *In re DSCC* (Aug. 21, 1995). The letter cited by the RNC simply acknowledged that the DSCC had "fulfilled its obligations" under the conciliation agreement. See Letter from Jin Lee, Attorney, FEC, to Mark Elias and Jonathan Berkon, Perkins Coie LLP (Nov. 19, 2012).

[7] See Democratic Party of N.M., *Report of Receipts and Disbursements* 4, 219-220, Apr. 8, 2013, http://images.nictusa.com/pdf/488/

made directly to federal candidates, "federal officeholders [have been] well aware of the identities of the donors." *McConnell*, 540 U.S. at 147.

c. Appellants observe (*e.g.*, RNC Br. 21-22, 32-33; McCutcheon Br. 42) that the current version of FECA prohibits a single entity from evading contribution limits by creating or controlling multiple affiliated political committees. 2 U.S.C. 441a(a)(5); 11 C.F.R. 100.5(g). That prohibition forecloses what would otherwise be a particularly easy and effective means of circumventing the limits on contributions to any particular political committee. In the discussion upholding FECA's aggregate contribution limit in 1976, however, the Court in *Buckley* did not allude to the possibility that a single entity might create multiple political committees, much less suggest that the prevention of that risk was the sole justification for the aggregate limit. See 424 U.S. at 38. *Buckley's* concern with "unearmarked contributions to political committees likely to contribute to [a favored] candidate" exists regardless of whether the committees are created by the same entity or by different entities. *Ibid.* And FECA does not limit the number of political committees that may exist. As previously discussed, see pp. 36-37, *supra*, the current proliferation of committees, along with the simplicity of researching and contacting them, makes it quite easy for individual donors to identify committees that are likely to contribute to a particular candidate. If an individual gives the maxi-

---

13961253488/13961253488.pdf; Missouri Democratic State Comm., *Report of Receipts and Disbursements* 4, 70, May 13, 2013, http://images.nictusa.com/pdf/727/13962195727/13962195727.pdf; see also Democratic Congressional Campaign Comm., *Red To Blue 2012*, http://www.dccc.org/pages/redtoblue (last visited July 17, 2013) (identifying specific candidates for support).

mum contribution of $5000 to each of 100 non-party political committees, and one-fifth of that money is passed on to a favored candidate, that candidate will receive nearly 20 times the maximum amount the individual could give to the candidate directly.

d. Appellants contend (*e.g.*, RNC Br. 17, 34-36; McCutcheon Br. 41) that the government's anti-corruption and anti-circumvention interests are adequately protected by base limits that did not exist when *Buckley* was decided. The version of FECA in effect in 1976 imposed base limits on contributions to candidates, see 424 U.S. 23-36 (upholding the constitutionality of those limits), but it did not include the current limits on contributions to party committees or to other political committees. The addition of these further base limits, however, does not in itself prevent the harm at which the aggregate contribution limits are directed, namely, the possibility that someone could "contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Id.* at 38.

Such a scheme would not have been significantly easier to carry out when *Buckley* was decided than it is to carry out now. Even at the time of *Buckley*, FECA limited the amounts that political committees—including party committees—could contribute to political candidates (to $1000 or $5000 per election, depending on the particular type of committee). See 424 U.S. at 23 (explaining that $1000 limit on contributions to candidates applied to, *inter alia*, any "committee" or "association") (citation omitted); *id.* at 35 (explaining that certain political committees could contribute up to $5000); *id.* at 182, 187, 189 (reproducing relevant provisions). A contribu-

tor seeking to implement the scheme described in *Buckley* would thus have had to divide his money among many different political committees (potentially both party and non-party committees) to ensure that the targeted candidate would indeed receive the desired amounts. The Court nevertheless recognized the government's interest in restricting such a scheme through the use of aggregate contribution limits.

The current version of FECA limits not only the amounts that party and non-party political committees can contribute to candidates, see 2 U.S.C. 441a(a)(1)(A) and (2)(A), but also the amounts that individuals can contribute to such committees ($32,400 for national-party committees, $10,000 for state party committees, and $5000 for other political committees). 2 U.S.C. 441a(a)(1)(B)-(D); 78 Fed. Reg. 8532. Although those additional base limits may reduce circumvention of the base limits on contributions to candidates in certain ways, see *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 198 n.18 (1981) (plurality opinion), they do not make the scheme described in *Buckley* materially harder to execute. The success of such a scheme does not depend on the ability to contribute vastly more to a political committee than a political committee itself can contribute to the candidate. Rather, it depends on the ability of contributors to find various conduits through which unearmarked funds can reach a candidate. Notwithstanding the intervening enactment of limits on contributions to particular committees, donors can find suitable conduits as easily, or more easily, now than they could at the time of *Buckley*.

This Court's decision in *California Medical Association* v. *FEC*, *supra*, confirms that aggregate limits and limits on contributions to particular political committees

can coexist under the First Amendment. In that case, the Court upheld the constitutionality of a $5000 limit on contributions by an individual or an unincorporated association to a particular type of political committee, known as a "multicandidate political committee," that receives contributions from more than 50 people and contributes to five or more candidates. 453 U.S. at 184-185 & n.1 (citing 2 U.S.C. 441a(a)(4)). A plurality of the Court reasoned that, if a contributor could give unlimited amounts to a multicandidate political committee, he could circumvent both the $1000 limit on individual contributions to candidates (because the multicandidate political committees could contribute up to $5000 to a candidate) and the $25,000 limit on aggregate contributions (because the multicandidate political committee was not subject to any aggregate limit). *Id.* at 198 (plurality opinion). Justice Blackmun's concurrence contained similar reasoning. *Id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment) (agreeing that the limit on contributions to multicandidate committees could be upheld on anti-circumvention grounds, and analogizing the limit to "the $25,000 limitation on total contributions in a given year that *Buckley* held to be constitutional"). A majority of the Court thus recognized that aggregate limits can operate in tandem with limits on contributions to political committees, and that Congress is not required to choose between the two.

2. ***Appellants' challenges to FECA's aggregate contribution limits cannot be reconciled with* Buckley**

Because the current FECA framework is indistinguishable in all relevant respects from the FECA framework addressed in *Buckley*, this Court's decision upholding FECA's aggregate contribution limit remains

controlling. Appellants' criticisms of FECA's present aggregate contribution limits would have applied equally to the aggregate contribution limit at issue in *Buckley*.

a. Appellants repeatedly contend (*e.g.*, RNC Br. 20, 33, 36; McCutcheon Br. 37, 51-52) that Congress has effectively disavowed any interest in preventing a scheme of the sort described in *Buckley*, in which unearmarked funds contributed to numerous entities are funneled to a particular candidate. In appellants' view, Congress has "made the judgment" that a contribution to a single entity within the base limit (*e.g.*, a contribution to a political-party committee up to $32,400) presents no "cognizable" risk of corruption. RNC Br. 36. They further assert that, because "[d]oing something posing zero *cognizable* risk multiple times does not increase the risk," Congress can have no valid interest in limiting the number of contributions up to the base limit a particular individual can make. *Ibid.* Appellants also make the related argument that Congress has "asserted no * * * concern" about the possibility that a funneling scheme might be carried out through the transfer of contributions between various party entities, because it has not enacted a specific law restricting such transfers. *Id.* at 20.

Appellants' arguments are flawed. First, it could just as easily have been argued in *Buckley* that base limits and the absence of transfer restrictions operated to disavow any congressional interest in preventing funneling schemes. The Court nevertheless upheld the aggregate limit as a reasonable means of preventing individual donors from funneling outsized contributions to candidates through the use of intermediaries. 424 U.S. at 38. Congress's decision to address such schemes in one way (aggregate contribution limits) rather than in an-

other (say, limits on transfers) does not cast doubt on Congress's interest in addressing them.

Second, Congress's choice of applicable base limits on contributions to candidates and other entities does not reflect any implicit determination that contributions below those limits pose no risk whatever of corruption or circumvention. Rather, FECA's base limits reflect Congress's effort to balance competing objectives, enabling individuals to legitimately influence elections while reducing the opportunities for actual and apparent corruption. See, *e.g.*, *Buckley*, 424 U.S. at 26 (noting that "the Act's primary purpose [is] to *limit* the actuality and appearance of corruption") (emphasis added). One of the factors Congress presumably considered in setting the base limits was the existence (and constitutionality) of "corollary" aggregate contribution limits, *id.* at 38, that would work in combination with the base limits. Congress also presumably relied on the existence of aggregate contribution limits as a factor in deciding not to regulate certain types of transfers.

b. Appellants characterize the aggregate contribution limits as an impermissible "prophylaxis-upon-prophylaxis" (RNC Br. 30-31) and argue that they are not sufficiently tailored (McCutcheon Br. 55-61). These contentions are incorrect and inconsistent with *Buckley*.

In characterizing FECA's aggregate limits as a "prophylaxis-on-prophylaxis," appellants assume that the base contribution limits are simply a prophylactic measure against bribery-like *quid pro quo* arrangements with public officials. See RNC Br. 27 n.18; McCutcheon Br. 61. The Court in *Buckley* observed, however, that because bribery laws reach "only the most blatant and specific attempts" to corrupt public officials with money, those laws do not fully vindicate the gov-

ernment's anti-corruption interests. 424 U.S. at 28; see *McConnell*, 540 U.S. at 143 (noting that the Court in *Buckley* "expressly rejected the argument that anti-bribery laws provided a less restrictive alternative to FECA's contribution limits"); *Shrink Mo. Gov't PAC*, 528 U.S. at 389 ("In speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' [the Court in *Buckley*] recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors."). The decision on which the RNC relies for the proposition that a "prophylaxis-upon-prophylaxis approach" is unconstitutional, *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (opinion of Roberts, C.J.), involved expenditure restrictions that, unlike the contribution restrictions at issue here, limited direct political speech and were subject to strict scrutiny. See *ibid.*; *id.* at 455-457.

McCutcheon's overbreadth argument (Br. 55-61) cannot be squared with *Buckley*, which rejected an analogous overbreadth challenge to the base contribution limits. The Court in *Buckley* assumed *arguendo* "that most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court concluded, however, that this assumption did not "undercut the validity of the $1,000 contribution limitation." *Id.* at 29-30. "Not only is it difficult to isolate suspect contributions," the Court explained, "but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30.

The "corollary" aggregate contribution limits, which the Court in *Buckley* likewise found constitutional, serve the same salutary purposes. *Id.* at 38.

c. Appellants contend (RNC Br. 29; McCutcheon Br. 44-48) that FECA's aggregate contribution limits cannot be upheld because the government has failed to provide sufficient "actual evidence" to establish the need for them. As McCutcheon acknowledges (Br. 46), however, the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Mo. Gov't PAC*, 528 U.S. at 391. The justification for the aggregate contribution limits at issue here is neither novel nor implausible, but is instead the same justification the Court deemed sufficient in *Buckley*. See *ibid.* ("*Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible."); see also *ibid.* ("*Buckley*'s evidentiary showing exemplifies a sufficient justification for contribution limits."); *McConnell*, 540 U.S. at 165 (explaining that Congress has "been taught the hard lesson of circumvention by the entire history of campaign finance regulation").

Furthermore, not only the Watergate-era and soft-money-era abuses previously discussed, see pp. 4-5, 7-8, 40-41, *supra*, but also more recent events, demonstrate the need for regulation that deters *quid pro quo* exchanges in which an officeholder solicits contributions not only to himself, but also to other entities. In 2005, Wisconsin Senate Majority Leader Chuck Chvala pleaded guilty to two felonies, following criminal charges that he solicited contributions to a variety of candidates and political committees in return for political favors. See

Steven Walters & Patrick Marley, *Chvala Pleads Guilty To 2 Felonies*, Milwaukee J. Sentinel, Oct. 26, 2005, at A1; Steve Schultze & Richard P. Jones, *Chvala Charged With Extortion*, Milwaukee J. Sentinel, Oct. 18, 2002, at A1; see also Jodi Wilgoren, *Leader Charged With Extortion and Misconduct*, N.Y. Times, Oct. 18, 2002, at A24. In 2006, former federal lobbyist Jack Abramoff pleaded guilty to corruption-related charges after evidence surfaced that he had, *inter alia*, directed contributors to make three separate contributions (totaling $32,000) to a congressman and political committees in return for the congressman's acquiescence in inserting language into a bill. James V. Grimaldi & Susan Schmidt, *Lawmaker From Ohio Subpoenaed in Abramoff Case*, Washington Post, Nov. 5, 2005, at A4; Dep't of Justice, *Former Lobbyist Jack Abramoff Pleads Guilty to Charges Involving Corruption, Fraud Conspiracy, and Tax Evasion* (Jan. 3, 2006), http://www.justice.gov/opa/pr/2006/January/06_crm_002.html. And in 2010, former House Majority Leader Tom DeLay was found guilty following charges that he, *inter alia*, circumvented state law by using his political committee and the RNC as conduits to funnel $190,000 from several contributors to seven Texas state candidates. James C. McKinley, Jr., *DeLay Convicted in Donation Case by a Texas Jury*, N.Y. Times, Nov. 25, 2010, at A26. Although these particular schemes were eventually discovered and punished, such schemes are not always easy to detect, and Congress thus has strong reasons to limit a donor's ability to contribute large sums at a candidate's or officeholder's request.

d. In addition to asserting facial challenges to BCRA's aggregate contribution limits, the RNC argues (*e.g.*, Br. 32 & n.24, 42 & n.33) that the aggregate limit on contributions to non-candidate political committees is

unconstitutional as applied to contributions received by national party committees.[8] In rejecting a facial challenge to the then-existing aggregate limit, however, the Court in *Buckley* specifically recognized Congress's interest in preventing parties from serving as conduits for large contributions. 424 U.S. at 38. *Buckley*'s conclusion on that point was reinforced by this Court's subsequent decision in *Colorado II*, which rejected the argument that contributions to political parties have no potential for corruption or circumvention of other campaign-finance laws. The Court recognized that, "whether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 452; see *McConnell*, 540 U.S. at 146 (observing that parties served as "willing intermediaries" for soft-money contributions). Congress thus has at least as much interest in regulating aggregate contributions to parties as it does in regulating aggregate contributions to other types of entities.[9]

---

[8] Unlike the single aggregate contribution limit upheld in *Buckley*, the current aggregate contribution limits are broken into separate categories for different types of contributions. See pp. 9-10, *supra*. That modification provides no basis for avoiding the binding force of *Buckley*'s holding that an aggregate limit is constitutional. As the Court recognized in *Buckley*, the undifferentiated $25,000 limit had the purpose and effect of limiting total contributions to parties, candidates, and political committees. 424 U.S. at 38. It is irrelevant that Congress now pursues the same objectives through multiple aggregate contribution limits, rather than through a single aggregate cap.

[9] The RNC argues (Br. 52-53) that, if the aggregate limit (currently $74,600 per election cycle) on contributions to non-candidate committees is held invalid as applied to the contributions received by national parties, the subsidiary limit (currently $48,600) on contributions to other non-candidate committees is inseverable and therefore should be struck down as well. BCRA's severability clause forecloses that contention. That clause states that the invalidation of "any provision

e. Appellants suggest (RNC Br. 44; McCutcheon Br. 38-39) that aggregate contribution limits constitute an impermissible attempt to equalize the amount of speech on different sides of a political campaign. But the Court in *Buckley* recognized that contribution limits, unlike expenditure limits, are not speech-equalization measures. 424 U.S. at 25-26 & n.26. "Contribution limitations alone," the Court explained, "would not reduce the greater potential voice of affluent persons and well-financed groups, who would remain free to spend unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters." *Id.* at 26 n.26. Contribution limits, including aggregate contribution limits, are instead an effort to curtail corruption and the appearance of corruption stemming from outsized campaign contributions. *Id.* at 23-38. Because FECA's current aggregate contribution limits further that purpose in precisely the same way as the aggregate contribution limit at issue in *Buckley*, appellants' challenge to those limits lacks merit.

---

of [BCRA] * * *, or the application of a provision * * * to any person or circumstance," does not affect the validity of other provisions or applications of BCRA. BCRA § 401, 116 Stat. 112; 2 U.S.C. 454 note.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

LISA J. STEVENSON
Deputy General Counsel
KEVIN DEELEY
ADAV NOTI
Acting Associate General Counsels
CHARLES KITCHER
Attorney
Federal Election Commission

DONALD B. VERRILLI, JR.
Solicitor General
MALCOLM L. STEWART
Deputy Solicitor General
ERIC J. FEIGIN
Assistant to the Solicitor General

JULY 2013

APPENDIX

1. The First Amendment provides in pertinent part:

Congress shall make no law * * * abridging freedom of speech.

2. 2 U.S.C. 431(11) provides:

Definitions

* * * * *

(11) The term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

3. 2 U.S.C. 441a provides in pertinent part:

Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) Except as provided in subsection (i) of this section and section 441a-1 of this title, no person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $2,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $25,000;

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000; or

(D) to a political committee established and maintained by a State committee of a political party in any calendar year which, in the aggregate, exceed $10,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of

the next even-numbered year, no individual may make contributions aggregating more than—

(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

(4) The limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party. For purposes of paragraph (2), the term "multicandidate political committee" means a political committee which has been registered under section 433 of this title for a period of not less than 6 months, which has received contributions from more than 50 persons, and, except for any State political party organization, has made contributions to 5 or more candidates for Federal office.

(5) For purposes of the limitations provided by paragraph (1) and paragraph (2), all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be

considered to have been made by a single political committee, except that (A) nothing in this sentence shall limit transfers between political committees of funds raised through joint fund raising efforts; (B) for purposes of the limitations provided by paragraph (1) and paragraph (2) all contributions made by a single political committee established or financed or maintained or controlled by a national committee of a political party and by a single political committee established or financed or maintained or controlled by the State committee of a political party shall not be considered to have been made by a single political committee; and (C) nothing in this section shall limit the transfer of funds between the principal campaign committee of a candidate seeking nomination or election to a Federal office and the principal campaign committee of that candidate for nomination or election to another Federal office if (i) such transfer is not made when the candidate is actively seeking nomination or election to both such offices; (ii) the limitations contained in this Act on contributions by persons are not exceeded by such transfer; and (iii) the candidate has not elected to receive any funds under chapter 95 or chapter 96 of title 26. In any case in which a corporation and any of its subsidiaries, branches, divisions, departments, or local units, or a labor organization and any of its subsidiaries, branches, divisions, departments, or local units establish or finance or maintain or control more than one separate segregated fund, all such separate segregated funds shall be treated as a single separate segregated fund for pur-

poses of the limitations provided by paragraph (1) and paragraph (2).

(6) The limitations on contributions to a candidate imposed by paragraphs (1) and (2) of this subsection shall apply separately with respect to each election, except that all elections held in any calendar year for the office of President of the United States (except a general election for such office) shall be considered to be one election.

(7) For purposes of this subsection—

(A) contributions to a named candidate made to any political committee authorized by such candidate to accept contributions on his behalf shall be considered to be contributions made to such candidate;

(B)(i) expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate;

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee; and

(iii) the financing by any person of the dissemination, distribution, or republication, in whole

or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure for purposes of this paragraph; and[1]

(C) if—

(i) any person makes, or contracts to make, any disbursement for any electioneering communication (within the meaning of section 434(f)(3) of this title); and

(ii) such disbursement is coordinated with a candidate or an authorized committee of such candidate, a Federal, State, or local political party or committee thereof, or an agent or official of any such candidate, party, or committee;

such disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party and as an expenditure by that candidate or that candidate's party; and

(D) contributions made to or for the benefit of any candidate nominated by a political party for election to the office of Vice President of the United States shall be considered to be contributions made to or for the benefit of the candidate of

---

[1] So in original. The word "and" probably should not appear.

such party for election to the office of President of the United States.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

* * * * *

(c) Increases on limits based on increases in price index

(1)(A) At the beginning of each calendar year (commencing in 1976), as there become available necessary data from the Bureau of Labor Statistics of the Department of Labor, the Secretary of Labor shall certify to the Commission and publish in the Federal Register the percent difference between the price index for the 12 months preceding the beginning of such calendar year and the price index for the base period.

(B) Except as provided in subparagraph (C), in any calendar year after 2002—

(i) a limitation established by subsections (a)(1)(A), (a)(1)(B), (a)(3), (b), (d), or (h) of this

section shall be increased by the percent difference determined under subparagraph (A);

(ii) each amount so increased shall remain in effect for the calendar year; and

(iii) if any amount after adjustment under clause (i) is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100.

(C) In the case of limitations under subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h) of this section, increases shall only be made in odd-numbered years and such increases shall remain in effect for the 2-year period beginning on the first day following the date of the last general election in the year preceding the year in which the amount is increased and ending on the date of the next general election.

(2) For purposes of paragraph (1)—

(A) the term "price index" means the average over a calendar year of the Consumer Price Index (all items—United States city average) published monthly by the Bureau of Labor Statistics; and

(B) the term "base period" means—

(i) for purposes of subsections (b) and (d) of this section, calendar year 1974; and

(ii) for purposes of subsections (a)(1)(A), (a)(1)(B), (a)(3), and (h) of this section, calendar year 2001.

(d) Expenditures by national committee, State committee, or subordinate committee of State committee in connection with general election campaign of candidates for Federal office

(1) Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions, the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2), (3), and (4) of this subsection.

(2) The national committee of a political party may not make any expenditure in connection with the general election campaign of any candidate for President of the United States who is affiliated with such party which exceeds an amount equal to 2 cents multiplied by the voting age population of the United States (as certified under subsection (e) of this section). Any expenditure under this paragraph shall be in addition to any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for the office of President of the United States.

(3) The national committee of a political party, or a State committee of a political party, including any subordinate committee of a State committee, may not make any expenditure in connection with the general election campaign of a candidate for Federal office in a State who is affiliated with such party which exceeds—

(A) in the case of a candidate for election to the office of Senator, or of Representative from a State which is entitled to only one Representative, the greater of—

(i) 2 cents multiplied by the voting age population of the State (as certified under subsection (e) of this section); or

(ii) $20,000; and

(B) in the case of a candidate for election to the office of Representative, Delegate, or Resident Commissioner in any other State, $10,000.

(4) INDEPENDENT VERSUS COORDINATED EXPENDITURES BY PARTY.—

(A) IN GENERAL.—On or after the date on which a political party nominates a candidate, no committee of the political party may make—

(i) any coordinated expenditure under this subsection with respect to the candidate during the election cycle at any time after it makes any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle; or

(ii) any independent expenditure (as defined in section 431(17) of this title) with respect to the candidate during the election cycle at any time after it makes any coordinated expenditure under this subsection with re-

spect to the candidate during the election cycle.

(B) APPLICATION.—For purposes of this paragraph, all political committees established and maintained by a national political party (including all congressional campaign committees) and all political committees established and maintained by a State political party (including any subordinate committee of a State committee) shall be considered to be a single political committee.

(C) TRANSFERS.—A committee of a political party that makes coordinated expenditures under this subsection with respect to a candidate shall not, during an election cycle, transfer any funds to, assign authority to make coordinated expenditures under this subsection to, or receive a transfer of funds from, a committee of the political party that has made or intends to make an independent expenditure with respect to the candidate.

(e) Certification and publication of estimated voting age population

During the first week of January 1975, and every subsequent year, the Secretary of Commerce shall certify to the Commission and publish in the Federal Register an estimate of the voting age population of the United States, of each State, and of each congressional district as of the first day of July next preceding the date of certification. The term "voting age population" means resident population, 18 years of age or older.

(f) Prohibited contributions and expenditures

No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

* * * * *

(h) Senatorial candidates

Notwithstanding any other provision of this Act, amounts totaling not more than $35,000 may be contributed to a candidate for nomination for election, or for election, to the United States Senate during the year in which an election is held in which he is such a candidate, by the Republican or Democratic Senatorial Campaign Committee, or the national committee of a political party, or any combination of such committees.

4. 78 Fed. Reg. 8530 (Feb. 6, 2013) provides:

FEDERAL ELECTION COMMISSION

[Notice 2013–03]

Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold

AGENCY: Federal Election Commission.

ACTION: Notice of adjustments to contribution and expenditure limitations and lobbyist bundling disclosure threshold.

SUMMARY: As mandated by provisions of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), the Federal Election Commission ("FEC" or "the Commission") is adjusting certain contribution and expenditure limitations and the lobbyist bundling disclosure threshold set forth in the Act, to index the amounts for inflation. Additional details appear in the supplemental information that follows.

DATES: *Effective Date:* The effective date for the limitation at 2 U.S.C. 441a(a)(1)(A) is November 7, 2012. The effective date for the limitations at 2 U.S.C. 434(i)(3)(A), 441a(a)(1)(B), 441a(a)(3), 441a(d) and 441a(h) is January 1, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth S. Kurland, Information Division, 999 E Street NW., Washington, DC 20463; (202) 694–1100 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: Under the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, coordinated party expenditure limits (2 U.S.C. 441a(d)(2) and (3)(A), (B)), certain contribution limits (2 U.S.C. 441a(a)(1)(A) and (B), (a)(3) and (h)), and the disclosure threshold for contributions bundled by lobbyists (2 U.S.C. 434(i)(3)(A)) are adjusted periodically to reflect changes in the consumer price index. *See* 2 U.S.C. 434(i)(3) and 441a(c)(1), and 11 CFR 109.32 and 110.17(a), (f). The Commission is publishing this notice to announce the adjusted limits and disclosure threshold.

Coordinated Party Expenditure Limits for 2013

Under 2 U.S.C. 441a(c), the Commission must adjust the expenditure limitations established by 2 U.S.C. 441a(d) (the limits on expenditures by national party committees, state party committees, or their subordinate committees in connection with the general election campaign of candidates for Federal office) annually to account for inflation. This expenditure limitation is increased by the percent difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 1974).

1. Expenditure Limitation for House of Representatives in States with More Than One Congressional District

Both the national and state party committees have an expenditure limitation for each general election held to fill a seat in the House of Representatives in states with more than one congressional district. This limitation also applies to those states and territories that elect individuals to the office of Delegate or Resident Commissioner.[2] The formula used to calculate the expenditure limitation in such states multiplies the base figure of $10,000 by the difference in the price index (4.65647), rounding to the nearest $100. *See* 2 U.S.C. 441a(c)(1)(B) and 441a(d)(3)(B), and 11 CFR 109.32(b) and 110.17. Based upon this formula, the expenditure limitation for 2013 general elections for House candidates in these states is $46,600.

2. Expenditure Limitation for Senate and for House of Representatives in States With Only One Congressional District

Both the national and state party committees have an expenditure limitation for a general election held to fill a seat in the Senate or in the House of Representatives in states with only one congressional district. The formula used to calculate this expenditure limitation considers not only the price index but also the

---

[2] Currently, these states are the District of Columbia, the Commonwealth of Puerto Rico, and the territories of American Samoa, Guam, the United States Virgin Islands and the Northern Mariana Islands. *See http://www.house.gov/representatives/.*

voting age population ("VAP") of the state. The VAP of each state is published annually in the **Federal Register** by the Department of Commerce. 11 CFR 110.18. The general election expenditure limitation is the greater of: The base figure ($20,000) multiplied by the difference in the price index, 4.65647 (which totals $93,100); or $0.02 multiplied by the VAP of the state, multiplied by 4.65647. Amounts are rounded to the nearest $100. *See* 2 U.S.C. 441a(c)(1)(B) and 441a(d)(3)(A), and 11 CFR 109.32(b) and 110.17. The chart below provides the state-by-state breakdown of the 2013 general election expenditure limitation for Senate elections. The expenditure limitation for 2013 House elections in states with only one congressional district[3] is $93,100.

---

[3] Currently, these states are: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming. *See http://www.house.gov/representatives/.*

SENATE GENERAL ELECTION EXPENDITURE LIMITS—2013 ELECTIONS

State	Voting age population (VAP)	VAP x .02 x the price index (4.65647)	Senate expenditure limit (the greater of the amount in column 3 or $93,100)
Alabama	3,697,617	$344,400	$344,400
Alaska	544,349	50,700	93,100
Arizona	4,932,361	459,300	459,300
Arkansas	2,238,250	208,400	208,400
California	28,801,211	2,682,200	2,682,200
Colorado	3,956,224	368,400	368,400
Connecticut	2,796,789	260,500	260,500
Delaware	712,042	66,300	93,100
Florida	15,315,088	1,426,300	1,426,300
Georgia	7,429,820	691,900	691,900
Hawaii	1,089,302	101,400	101,400
Idaho	1,169,075	108,900	108,900
Illinois	9,811,190	913,700	913,700
Indiana	4,945,857	460,600	460,600
Iowa	2,351,233	219,000	219,000
Kansas	2,161,601	201,300	201,300
Kentucky	3,362,177	313,100	313,100
Louisiana	3,484,090	324,500	324,500
Maine	1,063,274	99,000	99,000
Maryland	4,540,763	422,900	422,900
Massachusetts	5,244,729	488,400	488,400

Michigan	7,616,490	709,300	709,300
Minnesota	4,102,991	382,100	382,100
Mississippi	2,239,593	208,600	208,600
Missouri	4,618,513	430,100	430,100
Montana	783,161	72,900	93,100
Nebraska	1,392,120	129,600	129,600
Nevada	2,095,348	195,100	195,100
New Hampshire	1,045,878	97,400	97,400
New Jersey	6,838,206	636,800	636,800
New Mexico	1,571,096	146,300	146,300
New York	15,307,107	1,425,500	1,425,500
North Carolina	7,465,545	695,300	695,300
North Dakota	545,020	50,800	93,100
Ohio	8,880,551	827,000	827,000
Oklahoma	2,877,457	268,000	268,000
Oregon	3,038,729	283,000	283,000
Pennsylvania	10,024,150	933,500	933,500
Rhode Island	833,818	77,700	93,100
South Carolina	3,643,633	339,300	339,300
South Dakota	629,185	58,600	93,100
Tennessee	4,962,227	462,100	462,100
Texas	19,073,564	1,776,300	1,776,300
Utah	1,967,315	183,200	183,200
Vermont	502,060	46,800	93,100
Virginia	6,329,130	589,400	589,400
Washington	5,312,045	494,700	494,700
West Virginia	1,471,372	137,000	137,000
Wisconsin	4,408,841	410,600	410,600
Wyoming	440,922	41,100	93,100

Limitations on Contributions by Individuals, Non-Multicandidate Committees and Certain Political Party Committees Giving to U.S. Senate Candidates for the 2013–2014 Election Cycle

The Act requires inflation indexing to: (1) The limitations on contributions made by persons under 2 U.S.C. 441a(a)(1)(A) (contributions to candidates) and 441a(a)(1)(B) (contributions to national party committees); (2) the biennial aggregate contribution limitations applicable to individuals under 2 U.S.C. 441a(a)(3); and (3) the limitation on contributions made to U.S. Senate candidates by certain political party committees at 2 U.S.C. 441a(h). *See* 2 U.S.C. 441a(c). These contribution limitations are increased by multiplying the respective statutory contribution amount by 1.29668, the percent difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 2001). The resulting amount is rounded to the nearest multiple of $100. *See* 2 U.S.C. 441a(c) and 11 CFR 110.17(b). Contribution limitations shall be adjusted accordingly:

Statutory provision	Statutory amount	2013–2014 Limit
2 U.S.C. 441a(a)(1)(A)...	$2,000.....	$2,600.
2 U.S.C. 441a(a)(1)(B)...	$25,000.....	$32,400.
2 U.S.C. 441a(a)(3)(A)...	$37,500.....	$48,600.
2 U.S.C. 441a(a)(3)(B)...	$57,500 (of which no more than $37,500 may be attributable to contributions to political committees that are not political committees of national political parties).	$74,600 (of which no more than $48,600 may be attributable to contributions to political committees that are not political committees of national political parties).
2 U.S.C. 441a(h).....	$35,000.....	$45,400.

The increased limitation at 2 U.S.C. 441a(a)(1)(A) is to be in effect for the two-year period beginning on the first day following the date of the general election in the preceding year and ending on the date of the next regularly scheduled election. Thus the $2,600 figure above is in effect from November 7, 2012, to November 4, 2014. The limitations under 2 U.S.C. 441a(a)(1)(B), 441a(a)(3)(A) and (B), and 441a(h), shall be in effect beginning January 1st of the odd-numbered year and ending on December 31st of the next even-numbered year. Thus the new contribution limitations under 2 U.S.C. 441a(a)(1)(B), 441a(a)(3)(A) and (B), and

441a(h) are in effect from January 1, 2013, to December 31, 2014. *See* 11 CFR 110.17(b)(1).

Lobbyist Bundling Disclosure Threshold for 2013

The Act requires certain political committees to disclose contributions bundled by lobbyists/registrants and lobbyist/registrant political action committees once the contributions exceed a specified threshold amount. The Commission must adjust this threshold amount annually to account for inflation. The disclosure threshold is increased by multiplying the $15,000 statutory disclosure threshold by 1.13887, the difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 2006). The resulting amount is rounded to the nearest multiple of $100. *See* 2 U.S.C. 434(i)(3)(A) and (B), 441a(c)(1)(B) and 11 CFR 104.22(g). Based upon this formula ($15,000 × 1.13887), the lobbyist bundling disclosure threshold for calendar year 2013 is $17,100.

On behalf of the Commission.

Dated: January 31, 2013.

Ellen L. Weintraub,

Chair, Federal Election Commission.

[FR Doc. 2013–02520 Filed 2–5–13; 8:45 am]

BILLING CODE 6715–01–P

REPLY BRIEF

No. 12-536

In The
Supreme Court of the United States

Shaun McCutcheon and Republican National Committee, *Plaintiffs-Appellants*

v.

Federal Election Commission

On Appeal from the United States District Court
for the District of Columbia

Reply Brief for Appellant Republican National Committee

Stephen M. Hoersting
700 E. Schantz Ave.
Dayton, OH 45419
Hoersting@gmail.com
937/623-6102
Of Counsel

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Anita Y. Woudenberg
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/235-3685 facsimile
jboppjr@aol.com
Counsel for Republican National Committee

August 16, 2013

Corporate Disclosure

The Republican National Committee ("RNC") is an unincorporated association, so no corporations are involved.

Table of Contents

Corporate Disclosure.. . . . . (i)

Table of Contents. . . . . (ii)

Table of Authorities. . . . . (iii)

Argument.. 1

I. Aggregate Limits Fail Exacting Scrutiny, Though Strict Scrutiny Should Apply.. 1

II. The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Unconstitutional as Applied to National Party Committees.. 8

A. *Buckley*'s Facial Upholding of the "Ceiling" Does Not Control this Case, but this Court Should Apply *Buckley*'s Analysis.. 9

B. Congress Fixed *Buckley*'s Posited Conduit-Contribution Mechanism... 12

C. The $74,600 Aggregate Limit Lacks a Cognizable Interest as Applied to National Party Committees.. 14

III. The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Facially Unconstitutional.. 20

IV. The $48,600 Aggregate Limit on Contributions to State Party Committees and PACs Is Non-Severable and Should Be Struck.. . . 21

V. The $48,600 Aggregate Limit on Contributions to Candidates Is Unconstitutional... . . 22

Conclusion. 23

Table of Authorities

Cases

Alabama v. Smith, 490 U.S. 794 (1989)..... 22

Buckley v. Valeo, 424 U.S. 1 (1976)..... *passim*

California Med. Ass'n v. FEC, 453 U.S. 182 (1981) 12-13

Citizens United v. FEC, 558 U.S. 310 (2010)..... 4, 6

Cohen v. California, 403 U.S. 15 (1971)..... 4

Davis v. FEC, 554 U.S. 724 (2008)..... 2

FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007)..... 4

NAACP v. Button, 371 U.S. 415 (1963)..... 2

National Advertising Company v. Niagara, 942 F.2d 145 (2d Cir. 1991)..... 22

SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010)..... 6

United States v. Jackson, 390 U.S. 570 (1968)..... 22

Wisconsin Right to Life v. FEC, 546 U.S. 410 (2006)..... 8

Constitutions, Statutes, Regulations & Rules

2 U.S.C. 441a(a)(3)(A)..... *passim*

2 U.S.C. 441a(a)(3)(B)..... *passim*

U.S. Const. amend. I..... *passim*

Other Authorities

Robert Bauer, *"Dependence Corruption" Before the Supreme Court*, More Soft Money Hard Law, July 29, 2013, http://www.moresoftmon-

eyhardlaw.com/2013/07/dependence-corruption. 19

Robert Bauer, *The McCutcheon Case and the Contribution/Expenditure Limit Problem*, More Soft Money Hard Law, Apr. 26, 2013, http://www.moresoftmoneyhardlaw.com/2013/04/contributions-and-expenditures-in-campaign-finance-jurisprudence. 2

Robert Bauer, *Not so "Easy": The Futilities of the Contribution and Expenditure Distinction*, More Soft Money Hard Law, July 31, 2013, http://www.moresoftmoneyhardlaw.com/2013/07/contribution-expenditure-distinction. 2

Robert Bauer, *The Right to "Do Politics" and Not Just to Speak: Thinking about the Constitutional Protections for Political Action*, More Soft Money Hard Law, Apr. 26, 2013, www.moresoftmoneyhardlaw.com/2013/04/duke-law-speech. 7

Robert Bauer, *The Super PACs in the Campaign Finance Reform Debate*, More Soft Money Hard Law, July 24, 2013, www.moresoftmoneyhardlaw.com/2013 /07/super-pacs-reform-debate. 7

Adriana Cordis & Jeff Milyo, *Do State Campaign Reforms Reduce Public Corruption?*, April 2013, http://mercatus.org/sites/default/files/Milyo_ CampaignFinanceReforms_v2.pdf. 1

FEC, Matter Under Review 3620 (DSCC). 15, 18

Matea Gold, *Super PACs, other independent political groups already setting pace for 2016 presidential race*, Wash. Post, July 22, 2013, http://www.washingtonpost.com/politics/sup-

er-pacs-other-independent-political-groups-already-setting-pace-for-2016-presidential-race/2013/07/22/784cac46-efba-11e2-9008-61e94a7ea20d_story.html?wpisrc=nl_politics. 5

Joel M. Gora, *Free Speech, Fair Elections, and Campaign Finance Laws: Can They Co-Exist?*, 56 How. L.J. 763 (2013). 7

House Conference Report, H.R. Rep. No. 94-1057 (1976). 12-14

Argument

I.

Aggregate Limits Fail Exacting Scrutiny, Though Strict Scrutiny Should Apply.[1]

A holding for Appellants does not depend on the scrutiny level because the challenged limits fail exacting *or* strict scrutiny. But strict scrutiny should apply.

The same scrutiny should not apply to base and aggregate limits because they differ in kind and the latter impose a greater burden. RNC-Br.8-11. Unlike base limits, aggregate limits "restrict[] . . . the number of candidates and committees with which individuals may associate," *Buckley v. Valeo*, 424 U.S. 1, 38 (1976), and how much one may spend on contributions. *Buckley* further distinguished the two by requiring a quid-pro-quo risk (or its appearance[2]) to justify the limit on a direct contribution to a candidate, *id.* at 26, while requiring a conduit-contribution mechanism for an aggregate limit (showing how an intended candidate might actually *receive* a conduit-contribution so as to trigger a quid-pro-quo risk), *id.* at 38.

---

[1] Appellants' amici further address scrutiny. *See* Downsize DC Foundation et al. Br.; Sen. McConnell Br.4-22; Wisconsin Institute for Law & Liberty Br.; Cato Institute Br.

[2] The "appearance" must be of *quid-pro-quo corruption*, not general public perceptions of government, *see Buckley*, 424 U.S. at 26-27, yet "appearance" remains problematic. *See* Institute for Justice Br. *Cf.* Adriana Cordis & Jeff Milyo, *Do State Campaign Reforms Reduce Public Corruption?*, April 2013, http://mercatus.org/sites/default/files/Milyo_CampaignFinanceReforms_v2.pdf (campaign-finance regulations do not ameliorate public perceptions of corruption).

FEC says *Buckley* discussed the ceiling under a "Contribution Limitations" heading, called it "a restriction on 'contributions,'" and referenced "'associational freedom.'" FEC-Br.19. By pointing to the section of *Buckley* where this Court discussed the "ceiling" (a logical place for that discussion) and this Court's accurate description of what the ceiling restricted—while ignoring the essential distinctions this Court noted between base and aggregate limits—FEC erroneously argues by label. *See NAACP v. Button*, 371 U.S. 415, 429 (1963) ("mere labels" cannot foreclose rights). Examining the *essence* of aggregate limits reveals that "an aggregate limit . . . smacks of a spending limit." Robert Bauer, *The McCutcheon Case and the Contribution/Expenditure Limit Problem*, More Soft Money Hard Law, Apr. 26, 2013, http://www.moresoftmoneyhardlaw.com/2013/04/contributions-and-expenditures-in-campaign-finance-jurisprudence/.[3]

FEC says *Buckley* reviewed the "ceiling" "under . . . scrutiny applicable to contribution limits." FEC-Br.18-19 (citing 424 U.S. at *38*). *Buckley*'s page 38 is silent on scrutiny. *Buckley*'s earlier assertion that a limit on a contribution "to a candidate or political committee entails only a marginal restriction upon the contributor's . . . free communication," *id.* at 20, addresses contributions "*to*" a political entity, so it applies to *base* limits

---

[3] *See also* Robert Bauer, *Not so "Easy": The Futilities of the Contribution and Expenditure Distinction*, More Soft Money Hard Law, July 31, 2013, http://www.moresoftmoneyhardlaw.com/2013/07/contribution-expenditure-distinction (candidate's personal spending limit in *Buckley* analyzed as *contribution* limit by lower court, but as *expenditure* limit by this Court; *Davis v. FEC*, 554 U.S. 724 (2008), is both a contribution case and an expenditure case).

(which restrict a particular contribution *to* an entity), not *aggregate* limits (which restrict no *particular* contribution).

FEC says *Buckley* called the ceiling a "corollary" of the base limits and aggregate limits "further the same ultimate anti-corruption objective." FEC-Br.19. But the ceiling was also a *base* limit for contributions to PACs and political parties—in which sense *Buckley* mentioned "corollary." RNC-Br.3.[4] Aggregate limits only serve an anti-corruption interest if a conduit-contribution could *be received* by an intended candidate, RNC-Br.25-26, which FEC fails to prove and may not assume. That need to prove *receipt* of an attributable contribution is why *Buckley* required a conduit-contribution mechanism. 424 U.S. at 38. FEC's attempt to collapse *Buckley*'s conduit-contribution-mechanism requirement into an anti-corruption analysis typifies FEC's failure to provide the precision of analysis required for First Amendment rights.

FEC declares RNC's assertion that aggregate limits restrict the *number* of entities individuals may support at the full-base-level amount "misplaced." FEC-Br.20. FEC says what counts is *symbolic support*, which individuals may do for "as many entities as [they] wish[]" at minimal levels. *Id.* But *Buckley* said the "ceiling" limited the "number of candidates and committees with which individuals may associate." 424 U.S. at 38. Anyway, aggregate limits also restrict *how much* one may spend on contributions, even at less than base limits.

---

[4] The "ceiling" was deemed a "corollary" and "modest burden" in a specific statutory context where *Buckley* could posit a conduit-contribution mechanism, but Congress eliminated the context and mechanism, making those descriptions inapt. RNC-Br.15-24.

FEC's arguments at pages 20-23 do not alter these facts. For example, FEC argues that McCutcheon's desire to contribute $1,776 checks beyond the aggregate limits is mere "symbolism" and "of marginal First Amendment significance." FEC-Br.21. But that does not prove that aggregate limits do not limit the number of candidates one may support at the full base level, and it does not prove that he is unrestricted in the number of such checks.[5]

Similarly, FEC's argument that McCutcheon may make independent expenditures and volunteer remotely, FEC-Br.21-23, neither proves he is unlimited in the number of candidates he can support at desired levels nor solves his problem with making intended *contributions*. Telling McCutcheon to buy ads and volunteer—instead of making constitutionally protected contributions—is like telling Cohen to get a shirt with a different anti-draft message. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 477 n.9 (2007) ("*WRTL-II*") (controlling opinion) (citing *Cohen v. California*, 403 U.S. 15 (1971)) (rejecting notion that options vitiate constitutional protection for preferred activity). It is like telling Citizens United that, instead of doing electioneering communications, it can avoid the electioneering-communications definition (by not broadcasting its message or broadcasting outside blackout periods) or let a PAC speak instead. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 337 (2010) ("PAC . . . does not allow corporation[] to speak"). *See also* Sen. McConnell Br.13 ("Speech *by the candidate*, paid for with contributions

---

[5] FEC says "McCutcheon does not suggest" his intended contributions "would have meaningfully enhanced the candidate's electoral prospects or ability to communicate his message." FEC-Br.20. Appellants have no burden to prove that.

from supporters, is far more effective than the independent speech of a supporter." (citation omitted)).

FEC says to disregard the fact that candidates and political parties are increasingly being disadvantaged vis-a-vis super-PACs (not subject to aggregate limits). FEC-Br.22 n.3 (citing Cato Inst. Br.14-15).[6] This growing disadvantage goes to *Buckley*'s scrutiny dichotomy because it shows that it is no longer true "that the contribution limitations . . . have [no] dramatic adverse effect on the funding of campaigns and political associations," *Buckley*, 424 U.S. at 21. RNC-Br.12-13. Cato's brief highlights the public-policy choice at issue here: encouraging money to flow to traditionally favored political parties, which are accountable and transparent and which resist polarization, or to super-PACs and other groups, which are less accountable and transparent and which are more polarizing. *See* Cato Inst. Br. 13-15. This growing disadvantage is a growing burden on First Amendment rights, which requires stricter scrutiny, while reducing the incentive to circumvent contribution limits. *See* Cause of Action Br.24-30.[7]

---

[6] *See* Matea Gold, *Super PACs, other independent political groups already setting pace for 2016 presidential race*, Wash. Post, July 22, 2013, http://www.washingtonpost.com/politics/super-pacs-other-independent-political-groups-already-setting-pace-for-2016-presidential-race/2013/07/22/784cac46-efba-11e2-9008-61e94a7ea20d_story.html?wpisrc=nl_politics.

[7] It is not inconsistent to argue that (a) pooling money with a candidate to fund the candidate's own speech is more effective than independent speech and (b) the ability to pool money in a super-PAC advocating for that candidate alleviates pressure to circumvent limits with illegal conduit-contributions. People readily do something less effective, but

FEC's three attempts to argue against the implications of the growing disadvantage of political parties and candidates vis-a-vis super-PACs and other groups miss the mark. First, FEC says "advocacy groups can as easily support a candidate as oppose a candidate." FEC-Br.22 n.3. That is not the candidate's *own* message, and *Buckley* held that "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." 424 U.S. at 47. *See also Citizens United*, 558 U.S. at 357 (same).

Second, FEC says "contributions to candidates present corruption concerns that contributions to advocacy groups do not." FEC-Br.22 n.3. It is true that contributions *to candidates* involve a *quid-pro-quo-corruption risk*, *Buckley*, 424 U.S. at 26, that other contributions, e.g., *to political parties*, must be justified by a *conduit-contribution risk, id.* at 38, and that super-PACs pose neither corruption nor conduit-contribution risks and so are not subject to base and aggregate limits, *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 553 (2010). But these differing interests do not justify political parties and candidates being disadvantaged by aggregate limits for which the government proves no conduit-contribution mechanism.

Third, FEC says "Congress is not required to level the playing field to assure that candidates (or parties) can raise the same amount of money as advocacy groups." FEC-Br.22 n.3. RNC argues no such requirement. But this Court recognizes the need for candidates and parties to "amass[] the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Effec-

---

legal, instead of something more effective, but illegal, wanting to be legal though preferring to be more effective.

tiveness of advocacy is relative to the volume of competing voices. Effectiveness requires sufficient resources for candidates and political parties to get their *own* message out competitively. That relative ability is currently disadvantaged. Thus, this Court's scrutiny—which historically looks to the degree of burden—should be informed by the problems now wrought by aggregate limits.[8, 9]

Finally, this is a proper case to reverse *Buckley*'s expenditure/contribution scrutiny dichotomy, RNC-Br.11; McCutcheon-Br.32 n.17, and extend full protection to "doing politics," *see* Robert Bauer, *The Right to "Do Politics" and Not Just to Speak: Thinking about the Constitutional Protections for Political Action*, More Soft Money Hard Law, Apr. 26, 2013, www.moresoftmoneyhardlaw.com/2013/04/duke-law-speech. Appellants'

---

[8] Regarding "an answer to super PACs," "[w]hat may be needed is a more measured, creative course that . . . facilitates more speech and participation where the resources are harder to come by," e.g., "by freeing up resources, such as for grassroots mobilization and political parties." Robert Bauer, *The Super PACs in the Campaign Finance Reform Debate*, More Soft Money Hard Law, July 24, 2013, www.moresoftmoneyhardlaw.com/2013/07/super-pacs-reform-debate. *See also* Joel M. Gora, *Free Speech, Fair Elections, and Campaign Finance Laws: Can They Co-Exist?*, 56 How. L.J. 763, 780 (2013) (super-PACs are good but raise the "valid concern . . . that two of the most important actors in the political process—the candidates and the parties—are much more limited in their funding rights").

[9] Strict scrutiny also applies because the speech burden is cognizable and substantial-burden analysis requires it. *See* RNC-Br.12-14. FEC does not address these arguments.

amici explain why.[10]

However, even if this Court does not apply strict scrutiny or overrule *Buckley*'s dichotomy, the aggregate limits are unconstitutional under exacting scrutiny.

II.

The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Unconstitutional as Applied to National Party Committees.

Appellants challenge the $74,600 aggregate limit *as applied to national party committees*. RNC-Br.14-52. And the challenge to the aggregate limits on contributions to *candidates* is in the nature of an *as-applied* challenge, in relation to *Buckley*'s facial upholding of the blanket "ceiling." *See infra* II.A, V.

Yet FEC argues as if this were primarily a *facial*-challenge case and says "*Buckley* forecloses Appellants' challenge to the aggregate limits." FEC-Br.43. This is a version of FEC's attempt to evade an as-applied challenge in *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"). This Court unanimously held: "In upholding [the ban] against a facial challenge, we did not purport to resolve future as-applied challenges." *Id.* at 411-12. *Buckley*'s facial upholding of the "ceiling" does not foreclose the present as-applied challenges.

As in *WRTL-I*, the lower court here granted FEC's motion "to dismiss this case for failure to state a claim on which relief can be granted." Mot. Dismiss 1. FEC put in no evidence, arguing for dismissal as a matter of law based on *Buckley*'s purported foreclosure of these as-applied challenges. So RNC objects to FEC's effort

---

[10] *See* Cato Inst. Br.9-24; Downsize DC Foundation et al. Br.4-12 Sen. McConnell Br.4-22; Wisconsin Institute for Law & Liberty Br.

now to submit "evidence." *See, e.g.*, FEC-Br.53-54. Anyway, FEC's news articles reporting *violations* of campaign-finance laws do not prove any cognizable risk of a true "conduit-contribution," which must result from *legal* activity. *See* RNC-Br.2 n.1 (definition), 49-51. Tales of *illegal* activity involving *quid-pro-quo corruption* do not satisfy FEC's burden, though they provide evidence of the prophylaxes working.

A. *Buckley*'s Facial Upholding of the "Ceiling" Does Not Control this Case, but this Court Should Apply *Buckley*'s Analysis.

Buckley's *facial* holding does not control here because (a) this is an as-applied challenge, (b) Congress materially altered the statutory context necessary to *Buckley*'s holding, and (c) Congress repealed the old ceiling and replaced it with multiple aggregate limits. RNC-Br.15-16.

Regarding the *as-applied* nature of the challenges here, RNC's Question 1, says the challenge to the $74,600 limit is "as applied to contributions to national party committees." RNC-Br.i. Question 4 challenges the limit on contributions to candidates as simply "unconstitutional" because that limit applies *only* to contributions to candidates. Under *Buckley*'s facial upholding of the unified "ceiling," this challenge would have been as applied to contributions to candidates, so in relation to *Buckley* it is in the nature of an as-applied challenge.

Thus, regarding Questions 1 and 4, a precise analysis required FEC to make only arguments involving contributions to national party committees and candidates respectively, not any effect of contributions without aggregate limits to PACs or state/local parties. RNC made this clear, RNC-Br.32 & n.24, 42 & n.33,

though FEC disregards it by making broad-brush facial arguments. FEC concedes its facial focus by saying, "[i]n addition to asserting facial challenges to BCRA's aggregate limits, the RNC argues . . . that the aggregate limit . . . is unconstitutional as applied to contributions received by national party committees." FEC-Br.54-55.[11]

Buckley's *facial* upholding of the old "ceiling," does not resolve the as-applied challenges here (nor the overbreadth or severability issues). And FEC's analysis of as-applied challenges as a facial challenge lacks the precise analysis required for analyzing laws burdening protected political activity. *See Buckley*, 424 U.S. at 16 ("the exacting scrutiny required by the First Amendment").

However, though *Buckley*'s facial upholding of the old ceiling does not control here, this Court's *analysis* regarding the old "ceiling" should guide the present analysis, with careful attention to what *Buckley* required. RNC-Br.15-18, 25-26, 31-32. *Buckley* did not recite a generalized concern with corruption as justifying the ceiling. It precisely focused on something more specific. As applied to national party committees, that focus was on whether a conduit-contribution mechanism exists that permits "evasion of the [base] contribution limitation by a person . . . contribut[ing] massive amounts of money to a particular candidate through the use of unearmarked[,] . . . huge contributions to the candidate's [national] political party [committee(s)]." 424 U.S. at 38. That requires consideration of three

---

[11] FEC's argument regarding the as-applied challenge, FEC-Br.55, fails to prove that contributing the base limit to national-party committees poses a cognizable conduit-contribution risk.

questions from *Buckley*'s analysis:

- Is political-committee proliferation by national party committees possible?
- Can a "huge contribution" be made to a national party committee?
- Can a national party committee be a vehicle for a "massive" conduit-contribution to an intended, particular candidate?

RNC-Br.32.

Given *Buckley*'s precise focus, FEC is wrong in saying that absent an aggregate limit contributors could still "'contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party.'" FEC-Br.35 (citation omitted).

FEC is wrong because (inter alia) in the present challenge *as applied to national party committees*, no cognizance may be taken of "contributions to political committees likely to contribute to that candidate," *Buckley*, 424 U.S. at 38, beyond the allowable $48,600 limit for contributions to PACs and state/local parties (at which level Congress is satisfied as to any interests).[12] And the analysis must focus precisely on "contributions to the candidate's political party," *id.* at 38, which, as applied, must focus only on contributions to *national* party committees.

FEC must demonstrate that if an individual gives between $74,600 per biennium (current aggregate li-

---

[12] FEC is also wrong because it fails to show how a cognizable contribution actually reaches a candidate through the many prophylaxes existing without aggregate limits. *See* RNC-Br.26-52. *See infra* II.C.

mit) and $194,400 per biennium ($32,400/year to three national party committees), these unearmarked contributions are "huge" and pose a cognizable risk of a resulting "massive" conduit-contribution to an intended candidate despite existing laws designed to eliminate that risk.

B. Congress Fixed *Buckley*'s Posited Conduit-Contribution Mechanism.

The post-*Buckley* FECA amendments put a base limit on contributions to national party committees. RNC-Br.19-24. So a "huge" contribution to a national party committee is no longer possible and thus no "massive" conduit-contribution to an intended candidate through a national party committee is possible. And proliferation of committees by the same persons is not an issue with national party committees as there are only three per political party.[13]

FEC concedes that "those additional base limits may reduce circumvention of the base limits on contributions to candidates in certain ways, see *California*

---

[13] FEC says *Buckley* did not mention such proliferation *at page 38* of the opinion and that "FECA does not limit the number of *political committees* that may exist." FEC-Br.46 (emphasis added). But (a) *Buckley* mentioned the concern *earlier* in that opinion, (b) this Court focused on the problem caused by PAC-proliferation by the *same* entities, and (c) the 1976 Conference Report specifically identified this proliferation problem and said Congress fixed it. RNC-Br.32-34. *Buckley*'s concern with PAC proliferation may have caused the Court to envision a person giving the permitted $1,000 to a candidate, then creating, e.g., fifty single-candidate PACs for the purpose of giving the permissible $1,000 to each and using each PAC to contribute the permissible $1,000 contribution to the candidate.

Med. Ass'n v. FEC, 453 U.S. 182, 198 n.18 (1981)," but then asserts that "they do not make the scheme described in *Buckley* materially harder to execute." FEC-Br.48. FEC's efforts to avoid its concession are unavailing for two main reasons.

First, FEC's passing reference to *Cal. Med.*'s "n.18" does injustice to that footnote, which quotes the 1976 Conference Report that said post-*Buckley* base "limits restrict the opportunity to circumvent the $1,000 and $5,000 limits on contributions to a candidate." Though *Cal. Med.* relied on this Report, the Report is vital legislative history, and RNC discussed it prominently, RNC-Br.21-24, FEC mentions it only as "n.18." Yet, the Report states Congress's view that the FECA amendments fixed *Buckley*'s posited conduit-contribution mechanism.

Second, FEC says that *Buckley*'s mechanism didn't really rely on the things *Buckley* said it relied on, such as "huge" contributions to a political party, but "on the ability of contributors to find various conduits through which unearmarked funds can reach a candidate." FEC-Br.48. But *Buckley* justified the "ceiling" as applied to political parties precisely on the potential for "massive" contributions to an intended, "particular candidate" by means of "huge contributions to the candidate's political party." *Id.* at 38. *Buckley* isolated that mechanism from one involving PACs with a disjunctive "or." *Id.* If FEC really wants to argue that *Buckley* was wrong in justifying the "ceiling" (as it would apply here)—which FEC seems to do—it may do so (with attendant ramifications for its other arguments). But simply applying *Buckley*'s analysis, as RNC does, readily shows that *Buckley*'s posited mechanism is no longer possible. So FEC may not simply dismiss the now-

absent "huge contributions" element of this Court's mechanism in this as-applied challenge. Also, the search for "conduits" is limited in this as-applied challenge, excluding contributions to PACs and state/local parties. And since the Conference Report says Congress fixed *Buckley*'s conduit-contribution mechanism, FEC will have difficulty showing one.

C. The $74,600 Aggregate Limit Lacks a Cognizable Interest as Applied to National Party Committees.

FEC asserts a "circumvention technique." FEC-Br. 35. Thus, it concedes it must prove a mechanism. Its "technique" is contributing "to many different entities, each of which could then make its own contributions to the candidate." *Id.* The "*could*" is a fatal flaw, but first note the suggested entities.

FEC suggests using numerous *PACs* and *candidates* as conduits. FEC-Br.35-36. The only entities properly part of the present analysis are national party committees, and FEC makes no attempt to prove a "technique" only as to them.

FEC says entities it mentions might write a "single check" to a "joint fundraising committee." FEC-Br.37. These proposed elements of a purported conduit have already been refuted. *See* RNC-Br.47. *See also* NRSC & NRCC Br. (aggregate limits do not govern party-candidate relations and joint fundraising committees are not a means of circumventing contribution limits).

FEC's repeated use of "could" in its "circumvention technique" is a fatal flaw, as is its assertion that "[t]hese entities would then have considerable *discretion* to funnel . . . money to . . . candidates." FEC-Br.37 (emphasis added). This is the same speculation that RNC already highlighted and exposed as erroneous

analysis. RNC-Br.40-42, 48-51. And it is foreclosed by FEC's acknowledgment in MUR 3620 (DSCC) that unearmarked contributions do not bind a national party committee—even where a tally system exists—and so are non-cognizable as conduit-contributions. RNC-Br.41-42, 49 n.37. FEC's attempted evasion of MUR 3620, FEC-Br.45 n.6, ignores the MUR's underlying analysis.

Even under FEC's theory—that an individual giving to many entities "could" result in a contribution to a candidate somehow attributable to that individual—FEC fails to prove its case. FEC suggests conduit by candidate or leadership PAC, even providing some contribution totals. FEC-Br.38-39.[14] If FEC's "technique" works, there should be many examples of it, but FEC fails to show even one individual giving to many candidates and leadership PACs with resulting conduit-contributions to a particular candidate.[15] That is what FEC needed to show under its theory. It did not.

---

[14] Candidates are applicable only to Part V arguments, but as shown there they provide no cognizable conduit-contribution mechanism.

[15] FEC also fails to prove any joint fundraising committees comprising all (or even most) political party committees or candidates, as it suggests could be possible mechanisms. FEC-Br.37. *See also* Campaign Legal Center et al. Br.13-15 (providing examples of joint fundraising committees, none of which comprised all (or even most) political party committees or candidates). This failure to provide evidence of purported mechanism reveals them to be mere speculation. Such all-or most-entities events are unlikely given the separate interests of the entities involved. This failure of evidence also discredits the supposed "iron rule" that "whatever may lawfully be done will be done." Americans for Campaign Finance Reform Br.3.

FEC says it was "not . . . significantly easier to [make conduit-contributions] when *Buckley* was decided than . . . now" because there were limits on what political committees (e.g., party committees) could contribute, i.e., $5,000/election for multicandidate committees, $1,000/election for others. FEC-Br.47. FEC thus concedes the bottleneck problem that, with other prophylaxes, makes a cognizable conduit-contribution impossible.[16] RNC identified this problem in the Jurisdictional Statement (p.23), explaining that even if numerous contributors try to use a political committee as a conduit to get pro-rata contributions to a candidate, there is the barricade of the limit on contributions *to* a candidate. For example, if a $5,000 per candidate per election contribution *has already been made* by a party, then no matter how many contributors give in the hope of triggering a contribution to the candidate, no more can go to the candidate. The limits on contributions *to* and *by* political committees eliminate any cognizable circumvention risk.

Buckley said that, despite this known bottleneck, a "huge" contribution to a political party created a cognizable risk of a "massive contribution[]" traveling from an individual, through the party, to an intended, "particular candidate." 424 U.S. at 38. FEC now says *Buckley*'s analysis upholding the "ceiling" was wrong because of the bottleneck problem. But without needing to decide that question, simply applying *Buckley*'s

---

[16] FEC's amici also concede the bottleneck problem. Campaign Legal Center et al. Br.27. These amici also allege that Appellants recited a flawed FECA history by saying that name-of-another and earmarking provisions were enacted *after Buckley*. *Id.* The parts of Appellants' briefs amici cite show this is not so.

analysis, coupled with the 1976 FECA amendments, reveals that individuals may no longer make a "huge" contribution to a national party committee—so *Buckley*'s "ceiling" justification is gone.

Regarding that $5,000 bottleneck and FEC's theory, FEC needed to prove that there is a significant number of entities (though only national party committees are properly at issue here) likely to contribute to a candidate, where the entity

(a) does not already *have* $5,000 to make a contribution to a candidate that it wants to give to and

(b) has not already *made* the permitted $5,000 contribution to that candidate.

That situation would be necessary for FEC's argument that giving to a political party or PAC might *trigger* a $5,000 contribution to a candidate. Though the bottleneck has existed for decades, FEC does not show even *one* instance of this situation occurring. Under FEC's theory, there must be *many*.

Moreover, state parties (though not involved in this as-applied challenge), like national political parties, typically have considerable funds (far beyond $5,000), so they would likely already have contributed to a favored candidate.

Even if an individual's contribution to a state party could trigger a $5,000 contribution to a candidate, only one lucky person could do that because of the bottleneck problem. And an individual would experience considerable difficulty in locating "likely" entities that lacked money to contribute to a favored candidate and had not already contributed.

FEC also needed to prove that individuals *are giving to many such entities* in hopes of triggering a con-

tribution to an intended candidate. If FEC's "technique" actually works, there should be many examples of this. FEC proved none.

In the foregoing analysis, RNC has talked of what would be necessary under FEC's analysis to "trigger" a contribution. But even if a contribution were "triggered" when an individual contributed to an entity (wanting to contribute to a candidate) that had not already made a contribution to the candidate and lacked the money to do so, that "triggered" contribution would not be a conduit-contribution because there would be no cognizable *attribution* to the individual.

Given MUR 3620 (DSCC), if a contribution to a national party committee is not earmarked, any triggered contribution is not attributable to that individual as a conduit-contribution because the entity could have done something else with the contribution received. *See supra* at 15. And even *if* a contribution to a candidate could somehow be deemed attributable to an individual who made an unearmarked contribution to a national party committee, any contribution to and by the national party committee would have to be attributed on a pro-rated basis. RNC-Br.28. Under proration, the amount of a national party committee's contribution to a candidate attributable to an unearmarked contribution from an individual would be a small fraction of the national party committee's receipts and of the contribution to the candidate. *Id.* Proration yields tiny, non-cognizable amounts concerning contributions to and by national party committees, which have large amounts of receipts and disbursements. FEC fails to even mention proration, which applies to all purported conduits.

FEC suggests a problem with "direct solicitations from the President and Members of Congress," FEC-

Br.40, though it fails to explain how who solicits establishes a cognizable *conduit-contribution mechanism* or how a solicitor-corruption theory would not necessarily rely on a forbidden gratitude, access, or influence theory of "corruption." But if Congress deems "solicitation" a conduit-contribution issue, it must narrowly regulate solicitation, as it did regarding soft money, *see, e.g.*, 2 U.S.C. 441i(d), instead of imposing onerous burdens on core First Amendment rights.

RNC argued that Congress asserted its anti-conduit-contribution and anti-corruption interests only as far as the limits on contributions to and by national party committees, RNC-Br.36,[17] and that it asserted no interest regarding transfers. RNC-Br.48. FEC says this could have been argued against *Buckley*'s ceiling. FEC-Br.50. But *Buckley* posited a conduit-contribution mechanism based on Congress's *non*-assertion of interests as to base limits that were *added* after *Buckley* and it made no mention of transfers. *Buckley*'s posited mechanism is gone. FEC may not conjure another with transfers, especially since Congress expressly *excluded* transfers from the "contribution" definition *after Buckley*.[18]

---

[17] That Congress "balanc[ed] . . . objectives" in setting base levels, FEC-Br.51, does not alter this. If on balance, Congress decided to assert its anti-conduit interest at $32,400/year for a contribution to a national party committee, then contributing to three national party committees yearly at that safe level creates no governmental interest.

[18] Making unearmarked contributions to entities who might transfer funds to others who might contribute to a candidate is not *inherently* corrupting because it is possible *now*, under current limits, and Congress asserts no anti-corruption or anti-circumvention interest by regulating it.

Thus, the only remaining "justification" for the challenged aggregate limits is the forbidden equalizing interest. RNC-Br.44. FEC argues an out-of-context "equalizing" quote from *Buckley*, FEC-Br.56, that Appellants already refuted, Br. Opposing Mot. Dismiss or Affirm 9-10. *Buckley* noted that the government asserted an equalizing interest for the base limit on contributions to candidates, which *Buckley* did not reach because the anti-corruption interest sufficed. 424 U.S. at 26. *Buckley* added that base limits "alone would not reduce the greater potential voice of affluent persons and well-financed groups, who would remain free to spend unlimited sums directly to promote candidates and policies they favor in an effort to persuade voters." *Id.* at n.26. *Buckley* did not say that aggregate limits cannot be employed to pursue an equalizing interest.[19]

III.

The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Facially Unconstitutional.

Given the unconstitutionality of the $74,600 limit as applied to national party committees, it is also facially unconstitutional based on its substantial overbreadth. RNC-Br.52. FEC's arguments regarding PACs

---

[19] Professor Lessig's brief argues "dependence corruption," an equalizing theory. Professor Richard Hasen provides links to his ongoing arguments with Lessig to this effect at http://electionlawblog.org/?p=49937. *See also* Robert Bauer, *"Dependence Corruption" Before the Supreme Court*, More Soft Money Hard Law, July 29, 2013, http://www.moresoftmoneyhardlaw.com/2013/07/dependence-corruption/ (critiquing Lessig brief). However the Founders perceived "corruption," they forbade abridging speech, U.S. Const. amend. I, and pooling money to amplify speech.

and state and local parties are irrelevant to the as-applied challenge, and they are improper as to the First Amendment overbreadth challenge.[20]

FEC says an overbreadth argument should fail—not based on the breadth of contributions to national party committees—but because *Buckley* rejected an overbreadth challenge. FEC-Br.52. That challenge was to the base limit because "most large contributors do not seek improper influence . . . ." *Buckley*, 424 U.S. at 29. *Buckley*'s holding says nothing as to whether contributions to national party committees are a *substantial* part of overall contributions for overbreadth analysis, which they are. RNC-Br.52.

IV.

The $48,600 Aggregate Limit on Contributions to State Party Committees and PACs Is Non-Severable and Should Be Struck.

RNC demonstrated with strikeout text that, if the $74,600 limit is held unconstitutional, the remainder of 2 U.S.C. 441a(a)(3)(B) is meaningless, so Congress could not have intended the limit and sub-limit to be severable. RNC-Br.52-53.

FEC asserts "BCRA's severability clause" without addressing this meaningless-remainder problem. FEC-Br.55 n.9. A severability clause is not dispositive in

---

[20] However, even if including PACs and state/local parties were a proper analysis, the aggregate limits remain unjustified because of the post-*Buckley* FECA amendments establishing new base limits and restricting political-committee proliferation by the same entities and because FEC fails to prove a cognizable conduit-contribution risk in light of existing prophylaxes absent the aggregate limit. *See, e.g.*, McConnell Br.36-37.

such a situation. *See United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968) (severability rarely turns on severability clause), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *National Advertising Company v. Niagara*, 942 F.2d 145, 148 (2d Cir. 1991) (clause not dispositive).

V.

The $48,600 Aggregate Limit on Contributions to Candidates Is Unconstitutional.

The aggregate limit on contributions to candidates is unsupported by the requisite conduit-contribution mechanism. RNC-Br.53-59. This limit must be considered on its own merits—without reference to contributions to PACs and political parties—because (a) Congress isolated this limit in BCRA, (b) *Buckley* did not even suggest that candidates might pose a cognizable conduit-contribution risk, and (c) in relation to *Buckley*'s facial "ceiling" holding, this is in the nature of an as-applied challenge, *see supra* at 8-11.

FEC says, absent the aggregate limit, an individual could give the base limit to all House and Senate candidates, maybe even in a "single check" to a "joint fundraising committee." FEC-Br.37. And FEC says candidates can contribute limited amounts to other candidates, and some do, and they can make transfers to political parties. FEC-Br.38-39. But FEC fails to provide evidence of any joint fundraising committees comprising all (or even most) candidates, or of an individual contributing to many candidates with a resulting conduit-contribution to an intended candidate attributable to that individual. If FEC's technique works, there should be many. FEC proves none. FEC fails to prove a cognizable conduit-contribution risk from this lawful activity, given the prophylaxes in place absent aggre-

gate limits. RNC-Br.34-52, 53-59. RNC adopts the further arguments for this challenge in the McCutcheon Reply Brief.

Conclusion

This Court should hold for Appellants. RNC-Br.60.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Anita Y. Woudenberg
THE BOPP LAW FIRM, PC
The National Building
1 South Sixth Street
Terre Haute, IN 47807
812/232-2434 telephone
812/235-3685 facsimile
jboppjr@aol.com
Counsel for RNC

Stephen M. Hoersting
700 E. Schantz Ave.
Dayton, OH 45419
Hoersting@gmail.com
937/623-6102
Of Counsel

August 16, 2013

REPLY BRIEF

SUPREME COURT, U.S.
FILED
AUG 19 2013
OFFICE OF THE CLERK

No. 12-536

In the
Supreme Court of the United States

SHAUN MCCUTCHEON AND
REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,
v.
FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia

REPLY BRIEF FOR APPELLANT SHAUN MCCUTCHEON

Erin E. Murphy
BANCROFT PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036

Dan Backer
Paul Henry Jossey
DB CAPITOL
STRATEGIES, PLLC
717 King Street
Suite 300
Alexandria, VA 22314

Michael T. Morley
Counsel of Record
223 Pawnee Road
Cranford, NJ 07016
(860) 778-3883
michaelmorleyesq
@hotmail.com

Jerad Wayne Najvar
NAJVAR LAW FIRM
1 Greenway Plaza
Suite 100
Houston, TX 77046

Counsel for Plaintiff-Appellant Shaun McCutcheon

August 19, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

ARGUMENT 3

I. BCRA'S AGGREGATE CONTRIBUTION LIMITS SUBSTANTIALLY BURDEN CORE FIRST AMENDMENT RIGHTS 3

II. BCRA'S AGGREGATE LIMITS DO NOT FURTHER AN IMPORTANT GOVERNMENT INTEREST 8

A. There Is No Cognizable Circumvention Problem for BCRA's Aggregate Limits to Address 9

B. *Buckley* Does Not Relieve the Government of Its Burden of Establishing that BCRA's Aggregate Limits Are Constitutional 16

III. EVEN IF BCRA'S AGGREGATE LIMITS SERVE AN IMPORTANT INTEREST, THEY ARE NOT REMOTELY ADEQUATELY TAILORED 20

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) ..... *passim*

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley, Cal., 454 U.S. 290 (1981) 10, 18, 21

Citizens United v. FEC, 558 U.S. 310 (2010) 20

Colorado Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) 11, 12

Davis v. FEC, 554 U.S. 724 (2008) 4, 5, 8

FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) 6

FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 2, 11, 12

FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) 2, 8, 16, 22

McConnell v. FEC, 540 U.S. 93 (2003) 8, 20

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000) 22

Randall v. Sorrell, 548 U.S. 230 (2006) 7, 20

Witters v. Wash. Dep't of Servs. for Blind,
474 U.S. 481 (1986) 12

Zelman v. Simmons-Harris,
536 U.S. 639 (2002) 12

Statutes & Regulation

2 U.S.C. § 431(17) 7

2 U.S.C. § 432(e)(3)(A)(ii) 23

2 U.S.C. § 441a(a) ..... *passim*

2 U.S.C. § 441f 10

11 C.F.R. § 102.17 ..... 23, 24

Other Authorities

Democratic Party of N.M., *Report of Receipts and Disbursements* (Apr. 8, 2013), http://images.nictusa.com/pdf/488/13961253488/13961253488.pdf 14-15

William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 Notre Dame L. Rev. 1441 (2008) 24

Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541 (2004) 25

Missouri Democratic State Comm., *Report of Receipts and Disbursements* (May 13, 2013), http://images.nictusa.com/pdf/727/13962195727/13962195727.pdf 15

REPLY BRIEF

The Bipartisan Campaign Reform Act's ("BCRA") aggregate contribution limits unconstitutionally burden fundamental First Amendment rights. The government's attempts to demonstrate otherwise only underscore that imposing an ultimate limit on how many otherwise permissible contributions someone may make does not further any legitimate anti-corruption or anti-circumvention interest. Nor, under this Court's precedents, may aggregate limits be justified as a means of equalizing the relative ability of individuals to participate in the political process or preventing the kind of "influence" or "gratitude" this Court has already concluded does not constitute corruption.

Rather than attempt to defend BCRA's aggregate limits on their own terms, the government devotes the bulk of its brief to insisting that this Court's one-paragraph discussion upholding the Federal Election Campaign Act's ("FECA") aggregate contribution ceiling in *Buckley v. Valeo*, 424 U.S. 1, 38 (1976)—a decision that emphasized that this issue was not "separately addressed at length by the parties"—somehow forecloses challenges to BCRA's distinct provision. In doing so, the government largely ignores fundamental differences between FECA and BCRA, as well as key changes in this Court's campaign finance jurisprudence in the four decades since *Buckley*. Critically, FECA contained no limits *at all* on contributions to a political party committee or political action committee ("PAC"). The Court's decision to uphold an aggregate ceiling in that context in no way compels the conclusion that

Congress may impose aggregate limits in a scheme that contains not only a full complement of base limits, but numerous much more direct anti-circumvention measures as well. Nor, as this Court's post-*Buckley* decisions confirm, is there any circumvention concern to address when someone who has contributed the maximum permissible amount to a candidate also contributes unearmarked funds within base limits to a political committee that, without "prearrangement" or "coordination" with the contributor, independently chooses to make a contribution within base limits to the same candidate. *FEC v. Nat'l Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480, 498 (1985).

Even assuming aggregate limits serve some valid anti-circumvention purpose, they are not remotely adequately tailored to do so, and instead are nothing more than impermissible prophylaxis-upon-prophylaxis. Sweeping in far more First Amendment activity than there is any reason to suspect raises circumvention concerns, they are a blunderbuss approach to concerns that readily could be addressed by much more targeted measures. If Congress is concerned about transfers between candidates and/or committees, or the mechanics of joint fundraising committees ("JFC"), then it should devise a solution to those concerns. What Congress may not do is use aggregate limits to "suppress lawful" First Amendment activity "as the means to suppress" some small sliver of "unlawful" activity. *FEC v. Wis. Right to Life, Inc.* ("*WRTL II*"), 551 U.S. 449, 475 (2007) (plurality op.).

ARGUMENT

I. BCRA'S AGGREGATE CONTRIBUTION LIMITS SUBSTANTIALLY BURDEN CORE FIRST AMENDMENT RIGHTS.

The government's brief dramatically understates the severe burdens aggregate contribution limits impose on protected First Amendment activity. Whereas base limits restrict *how much* someone may contribute to a candidate or committee, aggregate limits effectively restrict *how many* candidates or committees to whom or which someone may contribute—even within the base limits Congress has already deemed sufficient to address any cognizable corruption concerns. The government inexplicably fights this premise, insisting that "aggregate contribution limits do not preclude a contributor from contributing to as many candidates, parties, and other committees as he desires." FEC Br. 24. But this Court long has recognized that an aggregate contribution ceiling "*does* impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." *Buckley*, 424 U.S. at 38 (emphasis added). Aggregate limits therefore differ in both kind and effect from base limits and impose far greater burdens on First Amendment activity. *See* McCutcheon Opening Br. 24-31.

The government's attempts to prove otherwise cannot be reconciled with this Court's precedents or the realities of the constitutionally protected conduct Congress seeks to curtail. The government first insists any burden on fundamental rights is minimal

because a contributor may increase the number of candidates to whom he may contribute by decreasing the size of his contributions. FEC Br. 24. At the outset, that argument ignores the expressive value of the size of a contribution. A $20 contribution sends a very different message than a $2,600 contribution regarding the strength of someone's support for a candidate—especially if the same person contributes more to other candidates. *See Buckley*, 424 U.S. at 21 ("the size of [a] contribution provides a very rough index of the intensity of the contributor's support"). Depriving someone of the ability to give each candidate as much support as he chooses within the base limits Congress has already imposed to address corruption concerns plainly imposes a substantial burden on that First Amendment right.

That burden is particularly pernicious because this Court has emphatically rejected the notion that Congress may structure campaign finance laws to penalize those who "robustly exercise[] th[eir] First Amendment right[s]." *Davis v. FEC*, 554 U.S. 724, 739 (2008) (striking down law that "require[d] a candidate to choose between the First Amendment right to engage in unfettered political speech" and avoiding a "penalty"); *see also Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818 (2011) (striking down law that imposed "'a special and potentially significant burden'" on candidate for "choosing to exercise his First Amendment right to spend funds on behalf of his candidacy"). That is exactly what aggregate limits do. They deprive those who wish to support numerous candidates or committees of the same control over the size of their contributions as those

who engage in less First Amendment activity. To put it in concrete terms, because of BCRA's aggregate limits, someone who wanted to contribute to one candidate in every federal race in 2006 "would [have] be[en] limited to contributing $85.29 per candidate for the entire election cycle." JS.App.14a. That is barely *2%* of what individuals who exercised their First Amendment rights less robustly were allowed to contribute to their candidates of choice.

Rather than deny that aggregate limits impose special burdens on those who exercise their First Amendment rights vigorously, the government simply insists that *Davis* and *Bennett* involved only independent expenditures, not contributions. FEC Br. 24. *Bennett*, however, invalidated a law that imposed special burdens on candidates based in large part on the amount of contributions they received. *Bennett*, 131 S. Ct. at 2813-14. Moreover, the government does not and cannot offer any principled basis for allowing Congress greater leeway to use aggregate limits to impose a "special and potentially significant burden," *Davis*, 554 U.S. at 739, on individuals who exercise their First Amendment rights robustly by forcing them to choose among the candidates they wish to support up to the base limit. A "drag on First Amendment rights" does not become "constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id.*

The government attempts to justify this penalty by noting that aggregate limits leave individuals free to "donat[e] ... time and energy" to as many candidates or committees as they chose. FEC Br. 22. Again, this ignores the distinct First Amendment

burdens aggregate limits, as opposed to base limits, impose. When someone wants to express more support for one candidate than base limits allow, time and energy might offer a viable alternative. But aggregate limits affect individuals who wish to support *numerous*, often geographically dispersed, candidates and committees.

Notwithstanding the government's vague allusions to the telephone and Internet, FEC Br. 23, there are obvious practical limitations on the ability to associate with and express support for numerous candidates and committees throughout the country. Time and geographic constraints make it unrealistic to personally or physically participate in more than a few campaigns in any given election cycle. Moreover, a bumper, lapel, front lawn, or even Internet homepage has only so much space for stickers, buttons, lawn signs, and online banners, meaning any attempt to associate with and express support for a large number of candidates through such means tends to crowd out and dilute the impact of each individual communication. In any event, local means of expressing support such as lawn signs and bumper stickers do little for someone like McCutcheon, who wants to support 27 candidates spread across the country. Compl. ¶¶ 27-28 (Doc. 1). Thus, to the extent the government identifies alternative avenues for exercising First Amendment rights, they are much "more burdensome than the one [aggregate limits] foreclose[]." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (plurality op.).

The government's contention that individuals still may make independent expenditures fares no

better. FEC Br. 21-22. If that alone were enough to alleviate First Amendment concerns, then every contribution limit would survive constitutional scrutiny. *But see Randall v. Sorrell*, 548 U.S. 230 (2006) (invalidating Vermont's base contribution limits). Moreover, rather than offering an alternative means of associating with a candidate, independent expenditures require a substantial degree of *dissociation* between the speaker and candidate, lest the speaker's communications be perceived as "coordinated" and subject to contribution limits. 2 U.S.C. § 431(17). In any event, when someone wishes to support multiple geographically dispersed candidates, preparing and distributing flyers, drafting letters to the editor, developing television or newspaper advertisements, and other such activities are much less readily available avenues of expression and association than making a monetary contribution.

The burden imposed by aggregate limits is especially acute in primary elections. A contributor must make decisions about how many candidates to support and how much to contribute to each based in part on speculation about which and how many of those candidates will win their primaries and run in the general election, and how much support she may want to provide in that election. Aggregate limits thus pressure people to reduce the number or size of their contributions to avoid hitting their limit too early in an election cycle and retain flexibility should a special election or other unexpected development arise. *Cf. Bennett*, 131 S. Ct. at 2328 (invalidating law that required privately funded candidate "to make guesses about how much he will receive in the

form of contributions and supportive independent expenditures," noting that "[h]e might well guess wrong").

In short, aggregate contribution limits substantially burden core First Amendment activity. The government therefore bears a particularly heavy burden in establishing their constitutionality. *See Davis*, 554 U.S. at 744 ("the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights"). Indeed, for all the reasons identified by the RNC and Appellants' *amici*, such limits should be subject to strict scrutiny. *See* RNC Reply Br. 1-8; *McConnell v. FEC*, 540 U.S. 93, 141 n.43 (2003) ("the associational burdens imposed by a particular piece of campaign-finance regulation may at times be so severe as to warrant strict scrutiny"); Br. of *Amicus Curiae* Sen. Mitch McConnell 4-22. But in the end, whether the Court applies strict or exacting scrutiny is beside the point because the government cannot carry its burden of establishing that BCRA's aggregate limits are constitutional under either standard.

II. BCRA'S AGGREGATE LIMITS DO NOT FURTHER AN IMPORTANT GOVERNMENT INTEREST.

This Court has deemed only two closely related interests sufficiently important to allow the government to abridge First Amendment rights through contribution limits: avoiding corruption and avoiding the appearance of corruption. *WRTL II*, 551 U.S. at 478-79. By extension, the Court also has recognized a government interest in preventing circumvention of anti-corruption measures. As the

government's arguments ultimately reveal, BCRA's aggregate limits do not further any such interests. Instead, at most, they serve only to limit the kind of "influence" or "access" this Court already has concluded does not constitute corruption, or promote the kind of First Amendment "equalization" this Court has long rejected.

A. There Is No Cognizable Circumvention Problem for BCRA's Aggregate Limits to Address.

The government appears to accept that BCRA's aggregate limits may be upheld only as anti-circumvention measures—and for good reason, as they plainly do not combat corruption directly. Congress's anti-corruption interest is limited to preventing actual or apparent *quid pro quo* corruption through massive contributions. *Buckley*, 424 U.S. at 28. Congress has addressed that problem directly by imposing base limits on contributions to candidates, which already embody its judgment regarding the point at which the size of a contribution raises cognizable corruption concerns. There is no reason to assume that a candidate who receives a contribution within those base limits from an individual will suddenly become significantly more susceptible to *quid pro quo* corruption by that individual simply because the individual decides to make similar contributions to nine other candidates.

The government therefore bears the burden of demonstrating that aggregate limits are necessary to prevent circumvention of the base limits that already prevent the actuality or appearance of *quid pro quo* corruption. *Citizens Against Rent Control/Coalition*

for Fair Hous. v. City of Berkeley, Cal., 454 U.S. 290, 299 (1981). Its attempts to do so never get off the ground; the government identifies nothing whatsoever to substantiate its professed concern that allowing individuals to make contributions within allowable base limits to "too many" candidates or committees creates a cognizable circumvention concern.

At the outset, the government's argument is seriously undermined by the fact that BCRA already includes a plethora of much more direct anti-circumvention measures designed to prevent the very problem aggregate limits purportedly address. *See* McCutcheon Opening Br. 40-43. For instance, under earmarking provisions enacted in FECA and retained by BCRA, if someone contributes to a candidate or committee with the "direct[] or indirect[]" understanding that those funds are to be transferred to a particular candidate, the transaction is treated as a direct contribution from the original contributor to the ultimate candidate recipient. 2 U.S.C. § 441a(a)(8). BCRA also prohibits the making or receipt of a contribution "in the name of another," *id.* § 441f, meaning someone may not circumvent the statute's earmarking restrictions by funneling a contribution through another contributor.

The government nevertheless insists aggregate limits are needed to prevent *unearmarked* contributions from finding their way back to a candidate to whom a contributor already has given the maximum permissible amount. To begin with, as McCutcheon pointed out in his opening brief (at 51-52), that argument would justify virtually any

aggregate limit, as the government never explains why someone's tenth contribution is any more likely than his second or third contribution to find its way back to a particular candidate. But the government's argument also suffers from the more fundamental flaw that the "circumvention" it hypothesizes lacks the kind of coordination between candidate and contributor needed to give rise to a cognizable *quid pro quo* corruption concern under this Court's precedents.

As this Court has explained time and again, when there is no "prearrangement or coordination" between a candidate and someone who would like to spend money to support his candidacy, any such spending cannot function as "a *quid pro quo* for improper commitments from the candidate." *NCPAC*, 470 U.S. at 495, 498; *see also Colorado Republican Fed. Campaign Comm. v. FEC* ("*Colorado I*"), 518 U.S. 604, 617-18 (1996) ("the constitutionally significant fact ... is the lack of coordination between the candidate and the source of the expenditure"). That is why the Court has repeatedly rejected independent expenditures limits—the "absence of prearrangement and coordination," *NCPAC*, 470 U.S. at 498, ensures a "separation between candidates and independent expenditure groups" that "negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which [the Court's] case law is concerned." *Bennett*, 131 S. Ct. at 2826-27.

The government faces the same problem here. Precisely because the source of an *unearmarked* contribution, by definition, may not "in any way ...

direct[]" the subsequent disposition of those funds, 2 U.S.C. § 441a(a)(8), any contribution that a party committee or PAC makes to a candidate may not be attributed to its contributors. A committee's free, independent, and uncoordinated decisions about the candidates to which it will contribute prevent any risk of corruption with respect to those candidates and the committee's contributors. *NCPAC*, 470 U.S. at 495; *Colorado I*, 518 U.S. at 617-18.

In that sense, an unearmarked contribution is like a general grant of government funding. As the Court has explained in its Establishment Clause cases, when the government provides funds or other benefits to individuals who independently choose to contribute them to or use them in connection with religious institutions, those individuals' decisions are neither attributable to the government nor deemed official support of religion. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) (rejecting argument that "a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it an *imprimatur* of government endorsement"); *Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481, 488 (1986) ("[a]ny aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients").

Just as the link between the government and a religious institution is severed by the independent choices of intermediaries, here, "[t]he candidate-funding circuit is broken," *Bennett*, 131 S. Ct. at 2826. There is no prearrangement or coordination

between the "ultimate" recipient and the "original" contributor when the "intermediary" committee makes an independent determination as to what to do with the contribution. Indeed, the argument is even stronger here because the recipient of an unearmarked contribution is not only presumed but *legally required* to decide how to spend a contribution independent from the contributor's direction or control. 2 U.S.C. § 441a(a)(8). Because there is no constitutionally cognizable risk of *quid pro quo* corruption when the contributor has lost all control over the funds, there is no important or even legitimate interest in prohibiting the contribution.

The government seems to recognize this, as it, too, ultimately concedes that the recipient of a contribution has "considerable discretion" in deciding what to do with the funds. FEC Br. 37. It is little surprise, then, that most of the circumvention scenarios it hypothesizes involve the kind of coordination or prearrangement that is already precluded by laws restricting coordinated expenditures, earmarking, contributions in the name of another, and the like. *See* FEC Br. 37-38 (suggesting a party might use a contribution to make coordinated expenditures on a candidate's behalf); FEC Br. 41-42 (analogizing to laws that preclude attempts to bribe federal employees by instructing third parties to pass along otherwise impermissible gifts). The government's attempt to analogize political contributions to efforts to bribe federal employees—an activity that is decidedly not entitled to First Amendment protection—only underscores the extent to which it trivializes the constitutional interests at stake.

Beyond that, the government invokes scenarios where not only is coordination or prearrangement lacking, but the amount of the contribution that theoretically might be "credited" to a particular contributor is so minimal as to be non-cognizable. Taking contributions to national party committees as an example, the RNC raised more than $386 million during the 2012 election. McCutcheon Opening Br. 51. Even if someone contributed the maximum to the RNC ($32,400), and the RNC in turn contributed the maximum to a candidate ($5,000), the *pro rata* share of that contribution for which the candidate could "credit" the "original" contributor would be less than one hundredth of one percent, amounting—quite literally—to pocket change.

The government's own examples confirm that contributions to state parties are no different. The government notes that the Democratic Party of New Mexico spent $210,000—96% of its coordinated expenditures—on behalf of one candidate in 2012. FEC Br. 45. But it conveniently omits the fact that the party received approximately $2.8 million in its federal account during that election cycle, meaning the *pro rata* share of its coordinated expenditures attributable to any one contributor was miniscule. The $334,604 the Missouri Democratic State Committee spent on coordinated expenditures was an even smaller percentage of its overall federal receipts.[1] Thus, even the government's cherry-picked

---

[1] *See* Democratic Party of N.M., *Report of Receipts and Disbursements* 3 (Apr. 8, 2013), http://images.nictusa.com/pdf/488/13961253488/13961253488.pdf; Missouri Democratic State

examples do not advance its circumvention argument.

The same ultimate attribution problem is true as to multicandidate PACs, which receive the lion's share of contributions made by individuals to PACs. These entities must be funded by 50 or more individuals, must contribute to five or more candidates, and may not contribute more than $5,000 to any candidate. 2 U.S.C. § 441a(a)(2), (4). As the number of contributors to a multicandidate PAC or the number of candidates the PAC supports grows, the *pro rata* share of the PAC's contribution to a candidate that might be attributed to any particular contributor becomes increasingly negligible (assuming the candidate even knows who contributed to the PAC in the first place). That hardly has the makings of the kind of *quid pro quo* corruption with which this Court's cases are concerned.

In sum, the government's attempts to defend BCRA's aggregate limits on anti-circumvention grounds cannot withstand close scrutiny, as the circumvention concerns it suggests are unfounded. Unless campaign finance regulation is to devolve into the sort of prophylaxis-upon-prophylaxis—upon even more prophylaxis yet—that this Court has already declared impermissible, *cf. WRTL II*, 551 U.S. at 479, there must be some end to the government's ability to continue recycling the same generic corruption interests to justify ever more burdensome restrictions on core First Amendment activity.

Comm., *Report of Receipts and Disbursements* 3 (May 13, 2013), http://images.nictusa.com/pdf/727/13962195727/13962195727.pdf.

B. *Buckley* Does Not Relieve the Government of Its Burden of Establishing that BCRA's Aggregate Limits Are Constitutional.

Implicitly recognizing the myriad shortcomings of its efforts to establish that BCRA's aggregate limits are constitutional on their own terms, the government spends the bulk of its brief attempting to relieve itself of that burden by insisting that *Buckley* already resolved this case in its favor. *Buckley* did no such thing. *Buckley* upheld a specific aggregate contribution ceiling in a very different campaign finance scheme at a very different moment in this Court's jurisprudence. The government's attempt to convert *Buckley*'s single-paragraph discussion of that distinct provision into some sort of blanket immunity against challenges to aggregate limits both misreads *Buckley* and ignores critical changes to campaign finance law and jurisprudence in the past four decades.

After emphasizing that the issue "was not addressed at length by the parties," *Buckley* explained its rationale for upholding FECA's aggregate contribution ceiling in a single sentence:

> [T]his quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge

> contributions to the candidate's political party.

Buckley, 424 U.S. at 38. While the Court addressed this issue at even less length than the parties, this sentence suggests it was concerned with the possibility that someone might contribute "massive amounts" to a political party or committee that was "likely" to funnel those amounts back to a "particular candidate."

As McCutcheon explained in his opening brief (at 40-43), whatever validity these concerns might have had under FECA, they are inapplicable to BCRA. Unlike FECA, BCRA imposes base limits not only on contributions to candidate committees, but also on contributions to party committees and PACs. 2 U.S.C. § 441a(a)(1)(B)-(C). It thus is simply no longer the case, as it was under FECA, that someone may make unlimited contributions to party committees and PACs.[2] Nor may someone circumvent BCRA's base limits by contributing to multiple PACs created or controlled by a single entity, as BCRA treats all such PACs as a single committee. *Id.* § 441a(a)(5). Because Congress has foreclosed these "massive" contribution avenues directly, the government may no longer justify aggregate limits as a surrogate base limit on contributions to party committees and PACs.

The government attempts to downplay this distinction between FECA and BCRA, FEC Br. 47,

---

[2] Post-*Buckley* amendments also added base limits—which FECA originally lacked—on how much a PAC may contribute to another PAC or a local, state, or national political party. 2 U.S.C. § 441a(a)(2).

but its importance cannot be overstated. The core concern this Court has identified in upholding base contribution limits is the possibility that *"large* campaign contributions" might create "the actuality and potential for corruption." *Buckley*, 424 U.S. at 28 (emphasis added); *see also Citizens Against Rent Control*, 454 U.S. at 296-97 (noting that "*large* contributors to a *candidate*" can create actuality or appearance of corruption (first emphasis added)). It is understandable that the Court deemed an aggregate contribution ceiling permissible in a regulatory scheme that imposed no limits on contributions to political parties or committees. But neither *Buckley* nor any other decision of this Court has suggested Congress may impose aggregate limits *on top of* a full complement of base limits—let alone on top of myriad other anti-circumvention measures as well. Thus, Appellants do not seek to limit *Buckley*; rather, the government seeks to extend it.[3]

That is nowhere more apparent than in its repeated insistence that aggregate limits are needed to prevent someone from contributing *a total* of

---

[3] Although the government notes that FECA contained a few of BCRA's restrictions, *Buckley* did not discuss or rely on those measures when assessing the constitutionality of FECA's aggregate ceiling. The *Buckley* Court thus may well have overlooked the importance of FECA's earmarking provisions or, as more recent cases have suggested, overestimated the potential for *unearmarked* contributions to be used as mechanisms for circumvention. While there is no need to revisit the constitutionality of FECA's long-since repealed provision, this Court certainly need not extend *Buckley*'s reasoning to entirely distinct aggregate limits imposed as part of a very different campaign finance scheme.

millions of dollars to all national, state, and local parties combined, thereby "acquir[ing] actual or perceived 'improper influence,' ... *regardless of how the money is spent*." FEC Br. 40 (quoting *Buckley*, 424 U.S. at 27; emphasis added). First, that is not the kind of "massive" contributing with which *Buckley* was concerned. The anti-corruption concern *Buckley* identified was the possibility that someone might use "massive" contributions to committees to *circumvent* base limits on candidate contributions, not that a collection of modest, non-corrupting contributions might, when aggregated together, create the appearance of disproportionate influence or access, wholly apart from circumvention concerns. Indeed, *Buckley* could not have more clearly rejected the notion that Congress may seek to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections," *Buckley*, 424 U.S. at 48-49—a principle this Court has since reiterated, *see, e.g.*, *Bennett*, 131 S. Ct. at 2821 ("restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others ... is wholly foreign to the First Amendment").

Subsequent decisions likewise have rejected the "'generic favoritism or influence theory'" of corruption the government continues to espouse, condemning it as "'unbounded and susceptible to no limiting principle.'" *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (quoting *McConnell*, 540 U.S. at 296 (opinion of Kennedy, J.)). That a single contributor may have a disproportionately large impact on numerous races, garner potential influence over multiple candidates, or perhaps even earn their generalized gratitude is simply not a permissible basis for preventing him

from robustly exercising his First Amendment rights. "Ingratiation and access ... are not corruption," *id.* at 360, and the government may not invoke them to attach special burdens to the vigorous exercise of First Amendment rights.

The government's subtle resort to the same "equalization" and "undue influence" theories this Court already has rejected ultimately underscores the basic problem with its arguments. The government has no answer to the reality that subsequent developments in campaign finance law and jurisprudence preclude it from relying on the circumvention concerns articulated in *Buckley*. Just like base contribution limits, *see Randall*, 548 U.S. 230, each aggregate contribution limit must be justified on its own terms. The government cannot establish the constitutionality of BCRA's aggregate limits by mechanically pointing to *Buckley*'s analysis of a very different legal provision in a very different legal regime. Because the government has failed to demonstrate that BCRA's aggregate limits further any cognizable anti-corruption interest, the limits cannot survive heightened constitutional scrutiny.

III. EVEN IF BCRA'S AGGREGATE LIMITS SERVE AN IMPORTANT INTEREST, THEY ARE NOT REMOTELY ADEQUATELY TAILORED.

In all events, even assuming BCRA's aggregate limits further anti-circumvention interests rather than impermissible "equalization" or "undue influence" goals, they are a drastically overbroad means of doing so. At a minimum, aggregate limits must be "'closely drawn to avoid unnecessary

abridgement of associational freedoms.'" FEC Br. 18 (quoting *Buckley*, 424 U.S. at 25). BCRA's aggregate limits do not come close to satisfying that "exacting" standard, *Citizens Against Rent Control*, 454 U.S. at 298.

At the outset, even indulging the government's dubious assumption that allowing individuals to make contributions within base limits to more candidates, political parties, or PACs might raise circumvention concerns in *some* instances, the government has provided no evidence that the number of instances in which it would do so is significant. Instead, it mentions only a handful of newspaper articles and a press release about entirely inapposite corruption and circumvention incidents. FEC Br. 53-54. The government does not even try to show that aggregate limits would have done anything to prevent these already illegal activities; indeed, it appears that each of the transactions the government identifies was *within* aggregate limits (but prohibited by bribery and/or earmarking laws). Beyond that, the government offers only unsubstantiated speculation, but this Court has "never accepted mere conjecture as adequate to carry a First Amendment burden." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000). Thus, not only is the kind of illegal conduct the government identifies unaffected by aggregate limits, but aggregate limits prohibit far more contributions than there is any reason to suspect raise circumvention concerns under this Court's precedents.

Rather than attempt to demonstrate otherwise, the government points to *Buckley*'s rejection of an

overbreadth challenge to *base* contribution limits. FEC Br. 52. Once again, that ignores fundamental differences between limits on *how much* someone may contribute to each candidate and limits on *how many* candidates someone may support. Contributing $250,000 to one candidate is far different, and raises far different actual or apparent corruption concerns under this Court's precedents, than dividing the same amount among 100 different candidates.

In any event, a sweeping, maladroit prohibition on all contributions over a certain aggregate total—regardless of whether the recipients transfer those funds to another candidate, party, or PAC—is not an adequately tailored solution to any circumvention concern the government has identified. That Congress is regulating contributions does not change the fact that "the argument that protected speech may be banned as a means to ban unprotected speech ... turns the First Amendment upside down." *WRTL II*, 551 U.S. at 475. Here, Congress clearly could achieve its asserted anti-circumvention goals through much more direct means that would abridge far less First Amendment activity.

For example, Congress could require aggregate contributions above a threshold to be deposited into a special account that may not be transferred or re-contributed to other candidates or committees. Or it could prohibit contributions above an aggregate threshold only when made to a candidate committee or political committee that has expressed its intent to contribute to a recipient as to whom the potential contributor has reached her base limit. Congress

also could impose limits on a candidate's ability to solicit contributions to other candidates, party committees, or PACs from someone who has already reached her base limit on contributions to the soliciting candidate. Congress likewise could address the government's professed anti-circumvention concerns about political parties or JFCs through less restrictive means. For example, as to political parties, Congress could treat transfers from candidates to party committees, or between party committees, as ordinary contributions subject to base limits. And as to JFCs, Congress could limit how many entities may join a JFC, require funds received through a JFC to be spent by the recipient rather than transferred to another JFC participant or other committee, or treat transfers by or among participants in JFCs as ordinary contributions subject to base limits.[4]

---

[4] The government's concerns about JFCs are largely ephemeral. A JFC is simply a convenient vehicle that allows multiple candidates or political parties to fundraise together and enables contributors to contribute to multiple entities by writing a single check. 2 U.S.C. § 432(e)(3)(A)(ii); 11 C.F.R. § 102.17. Base limits cannot be avoided by contributing through a JFC. 11 C.F.R. § 102.17(c)(1). Candidate committees or political committees that form a JFC must agree on the percentage of each contribution that each participating entity will receive, *id.* § 102.17(c)(1), and no entity may accept contributions that exceed base limits, *id.* § 102.17(c)(3)(i), (c)(6)(i). Thus, when someone contributes to a JFC, the legal effect is no different than if she had written separate checks for a *pro rata* share of that contribution to each of the entities that comprise the JFC. The notion that all the participants in a JFC might independently and without earmarking choose to contribute all their contributions to a single recipient is conceptually dubious and empirically unsupported.

McCutcheon identified many of these less restrictive alternatives in his opening brief (at 60-61), but the government tellingly offers no response. Instead, it attempts to change the subject, insisting that aggregate limits are needed to prevent individuals from contributing to every member of the same congressional committee. FEC Br. 53. Rather than bolster the government's case, this argument only underscores the basic problem with aggregate limits. There would be nothing inherently suspect should an individual wish to make contributions within base limits to every member of a particular committee—a staunch education advocate, for example, might wish to support each member of the House Education and the Workforce Committee based on their support of critical education reforms. Congress's structure and procedures ensure that an individual's freedom, pecuniary interests, and political interests are directly affected by *numerous* members of Congress. *See* William N. Eskridge, Jr., *Vetogates*, Chevron, *Preemption*, 83 Notre Dame L. Rev. 1441, 1444-48 (2008). Someone who supports the enactment or repeal of a particular law or policy thus has a distinct interest in supporting *each* member of Congress who is in a position to promote that goal.

Moreover, every voter is directly and substantially affected by which political party controls each legislative chamber, which typically turns on races occurring all over the country. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 570-74 (2004). The enactment, amendment, or repeal of laws that

directly affect someone's freedom and well-being in areas such as health care, taxes, immigration, the economy, and environmental regulation, often depends on the outcome of those races. Individuals therefore have a substantial interest in associating with and expressing support for candidates in races throughout the country. That BCRA's aggregate limits prevent them from doing so is not a virtue but a vice.

Finally, experience contradicts the government's contention that aggregate limits are needed to prevent circumvention of base limits. Over 70% of states that limit contributions to candidates have concluded that aggregate limits are unnecessary. *See* McCutcheon Opening Br. 53-54 & n.21. The government has not introduced a shred of evidence that the absence of such limits has led to impermissible circumvention or actual or apparent corruption in those states. The relative scarcity of aggregate limits in state campaign finance schemes, coupled with the lack of evidence that the absence of such limits has fostered corruption, undermines any claim that aggregate limits are a closely drawn means of addressing circumvention concerns. Instead, BCRA's aggregate limits are superfluous prophylaxis-upon-prophylaxis and abridge far more First Amendment activity than the Constitution permits.

CONCLUSION

For these reasons, the Court should reverse and remand for entry of a permanent injunction.

Respectfully submitted,

Erin E. Murphy
BANCROFT PLLC
1919 M Street, NW
Suite 470
Washington, DC 20036

Dan Backer
Paul Henry Jossey
DB CAPITOL
STRATEGIES, PLLC
717 King Street
Suite 300
Alexandria, VA 22314

Michael T. Morley
Counsel of Record
223 Pawnee Road
Cranford, NJ 07016
(860) 778-3883
michaelmorleyesq
@hotmail.com

Jerad Wayne Najvar
NAJVAR LAW FIRM
1 Greenway Plaza
Suite 100
Houston, TX 77046

Counsel for Plaintiff-Appellant Shaun McCutcheon

August 19, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
MAY 8 - 2013
OFFICE OF THE CLERK

No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON AND
FEDERAL ELECTION COMMITTEE,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLANTS

PETER J. FERRARA
Counsel of Record
20594 Woodmere Court
Sterling, VA 20165
(703) 582-8466
peterferrara@msn.com

Counsel for Amicus Curiae
American Civil Rights Union

May 8, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE AGGREGATE LIMITS IN TODAY'S FEDERAL CAMPAIGN FINANCE LAW UNCONSTITUTIONALLY VIOLATE FREEDOM OF POLITICAL SPEECH AND FREEDOM OF POLITICAL ASSOCIATION	5
A. The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Unconstitutional	7
B. The Additional $48,600 Aggregate Limit on Contributions to State Party Committees and PACs Is Unconstitutional	9
C. The $48,600 Aggregate Limit on Contributions to Candidates Is Unconstitutional	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	Page(s)
Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011)	6
Boos v. Barry, 485 U.S. 312 (1988)	6
Buckley v. Valeo, 424 U.S. 1 (1976)	2, 5, 6, 7, 8
Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981)	6
Citizens United v. FEC, 130 S. Ct. 876 (2010)	8, 11
Davis v. FEC, 554 U.S. 724 (2008)	6
EMILY's List v. FEC, 581 F.3d 1 (D.C.Cir. 2009)	8
FEC v. Colorado Republican Federal Campaign Committee, 518 U.S. 604 (1996)	8
FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986)	6, 7
FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985)	6, 7, 8
FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007)	6, 7
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	6, 7
McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995)	6
Williams v. Rhodes, 393 U.S. 23 (1968)	7

TABLE OF AUTHORITIES—Continued

STATUTES

2 U.S.C. 441a(a)(3)(A) 3

2 U.S.C. 441a(a)(3)(B) 2

INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

---

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to protect the constitutional rights of all Americans, regardless of political correctness, including the First Amendment Right to Freedom of Speech.

STATEMENT OF THE CASE

Campaign finance law includes "base limits" restricting direct, total contributions to individual candidates, political parties, and PACs, 2 U.S.C. 441a(a)(1), and "aggregate limits" limiting total contributions combined to each and all of these entities in each election cycle, 2 U.S.C. 441a(a)(3). *See* MB-App. 17a (FEC, *Contribution Limits for 2013-2014*).

The base limits were upheld as constitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976) based on an anti-corruption interest in justification for the restriction. The aggregate limits were upheld in order to prevent evasion of the base limits, through contributions to parties and committees that the contributor knows or believes would be passed through to the contributor's favored candidate. The aggregate limits were upheld based on a different, anti-circumvention interest to justify the restriction.

Plaintiff McCutcheon filed suit challenging the aggregate limit (currently $74,600) on contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), as unconstitutional. McCutcheon wanted to con-

tribute $25,000 each to the Republican National Committee ("RNC"), National Republican Senatorial Committee ("NRSC"), and National Republican Congressional Committee ("NRCC") during the 2012 election cycle, but was prohibited from doing so by the aggregate limit.

McCutcheon's suit also challenged the aggregate limit (currently $48,000) on contributions to candidate committees, 2 U.S.C. 441a(a)(3)(A), as unconstitutional. At the time of suit, McCutcheon had contributed $33,088 to federal candidates and wanted to contribute another $21,312 to such candidates, but was prohibited from doing so by the aggregate limit.

Plaintiff Republican National Committee (RNC) is also a party to the suit, and challenges the aggregate limit on contributions to non-candidate committees as well. The RNC wants to receive such contributions but is prohibited from doing so by the aggregate limit.

Plaintiff-Appellants desire to engage in such actions in the future, if they are not prohibited from doing so by the aggregate limits. But if they are not relieved from the limits, their rights to freedom of speech and association will be abridged, which would subject them to irreparable harm.

Plaintiff-Appellants filed their Verified Complaint in the United States District Court for the District of Columbia on June 22, 2012. On September 28, the District Court granted the FEC's motion to dismiss. JS-App. 1a, 17a. Plaintiff-

Appellants noticed this appeal on October 10. JS-App. 18a.

SUMMARY OF ARGUMENT

The liberty interests at issue in this case include the core First Amendment activity – political speech – and the fundamental liberty interest of freedom of association. These core, fundamental, liberty interests of the First Amendment are entitled in our law to the highest possible protection – strict scrutiny.

Under strict scrutiny, restrictions on political speech and political association can only be allowed where they are justified by a compelling state interest, and only where the restrictions are narrowly tailored to serve that interest.

This Court has held that the only compelling state interest that can justify infringing such basic, core liberties is to prevent *quid-pro-quo* corruption, trading campaign contributions for political favors. That is the compelling interest that served to justify the base limits on campaign contributions.

But the aggregate limits serve no anti-corruption interest beyond what is already served by the base limits, and no other compelling state interest that can justify the infringement of these most basic, core, Constitutional liberties. That applies to the $74,600 aggregate limit on contributions to non-candidate committees. It applies to the $48,600 aggregate limit on contributions to state and local political parties and

PACs. And it applies to the $48,600 aggregate contribution to candidate committees.

We respectfully submit that this Court should consequently reverse the court below, and strike down all these aggregate limits as unconstitutional.

ARGUMENT

I. THE AGGREGATE LIMITS IN TODAY'S FEDERAL CAMPAIGN FINANCE LAW UNCONSTITUTIONALLY VIOLATE FREEDOM OF POLITICAL SPEECH AND FREEDOM OF POLITICAL ASSOCIATION.

The liberty interest at issue in this case is the core First Amendment activity – political speech. Contributors speak in the contributions they make, and those contributions are used to finance the political speech of a political campaign. As the Court said in *Buckley*, "[C]ontribution and expenditure limitations . . . [affect] the most fundamental First Amendment activities." 424 U.S. at 14.

This case also involves the fundamental liberty interest of freedom of association. Contributors associate themselves with candidates, campaigns, and political parties through political contributions such as those at issue in this case. Such freedom of political association, in particular, is another core First Amendment activity. As this Court also said in *Buckley*, "[T]he First . . . Amendment[] guarantees freedom to associate with others for the common

advancement of political beliefs and ideas, a freedom that encompasses (t)he right to associate with the political party of one's choice." *Id.* at 15 (citations and quotation marks omitted).

This Court in *Buckley* added, "Making a contribution, like joining a political party, serves to affiliate a person with a candidate [or a political party]. . . . [I]t enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* at 22.

The freedom to engage in core political speech, not pornography or nude dancing, has been recognized since the Founding as a fundamental foundation of our democracy, and the freedom of political association, forming political parties and campaigns, is just as important.

These core, fundamental, liberty interests of the First Amendment are consequently entitled in our law to the highest possible protection – strict scrutiny. *E.g., Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 300(1981) ("to limit the right of association places an impermissible restraint on . . . expression."); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011); *Davis v. FEC*, 554 U.S. 724,744 (2008); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("*MCFL*"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Boos v. Barry*, 485 U.S. 312 (1988); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007); *FEC v. National*

Conservative Political Action Committee, 470 U.S. 480 (1985)("*NCPAC*"); *Williams v. Rhodes*, 393 U.S. 23 (1968).

Can we possibly contemplate in these United States downgrading the constitutional protection for political speech below the highest level accorded to some other rights? Are we about to the point where we accord higher protection to pornography, nude dancing, and abortion than to the core political speech that has always been the foundation of our democracy?

Under strict scrutiny, restrictions on political speech and political association can only be allowed where they are justified by a compelling state interest, and only where the restrictions are narrowly tailored to serve that interest. *E.g., Buckley; MCFL; NCPAC; Bellotti; Wisconsin Right to Life.*

The base limits on contributions to political campaigns have been justified by a compelling state interest in preventing corruption. As this Court said in *NCPAC*, "[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." 470 U.S. at 496-497.

A. The $74,600 Aggregate Limit on Contributions to Non-Candidate Committees Is Unconstitutional.

Base contribution limits already apply to individual contributions to national parties, state and

local parties, and PACs. They are legally justified on a *quid-pro-quo* anti-corruption interest. *Buckley; NCPAC; Citizens United v. FEC*, 130 S. Ct. 876 (2010). Such *quid-pro-quo* corruption arises when elected officials provide political favors for campaign contributions. *NCPAC; Citizens United.*

But the aggregate limits on the non-candidate committees serve no anti-corruption interest. Such a corruption interest can only arise in relation to contributions to a particular candidate, who would then be in position to provide political favors in return once elected. *NCPAC*, 470 U.S. at 497; *Buckley*, 424 U.S. at 26; *EMILY's List v. FEC*, 581 F.3d 1, 6 (D.C.Cir. 2009). *See also, FEC v. Colorado Republican Federal Campaign Committee*, 518 U.S. 604 (1996). PACs, state and local parties, and even national political parties do not hold any offices they can use to provide political favors in return.

Moreover, without the aggregate limits, the base limits would remain, preventing any conceivable, compelling, anti-corruption interest. In today's modern framework of campaign finance restrictions, there is no compelling anti-circumvention interest that can be served by the aggregate limits in addition to the base limits in regard to non-candidate committees. Consequently, the restrictions on political speech and political association involved in the aggregate limits on contributions to non-candidate committees are unjustified and unconstitutional.

B. The Additional $48,600 Aggregate Limit on Contributions to State Party Committees and PACs Is Unconstitutional.

Besides the $74,600 aggregate limit on contributions to non-candidate committees, current campaign finance law provides for an additional $48,600 aggregate limit on contributions to state party committees and PACs. But base contribution limits still apply to contributions to state party committees and PACs as well. Those base limits are legally justified again on an anti-corruption compelling state interest.

But these additional aggregate limits cannot be justified by any anti-corruption interest either. They again do not relate to contributions to a particular candidate who can provide political favors in return. State parties and PACs do not hold elected offices empowering them to provide such favors.

Without the aggregate limits, the base limits would remain to serve the compelling anti-corruption state interest. The modern framework of campaign finance restrictions leaves no compelling anti-circumvention state interest to be served by the aggregate limits. Moreover, it is also true that this additional state and local party and PAC aggregate limit is not severable from the overall aggregate limit on non-candidate committee contributions, which is unconstitutional as explained in A. above. Therefore, this additional aggregate limit on state and local party and PAC contributions is unconstitutional as well.

C. The $48,600 Aggregate Limit on Contributions to Candidates Is Unconstitutional.

Base contribution limits of course already apply to candidate committees. There is no compelling government interest to justify the additional restrictions on political speech and political association involved in the additional $48,600 aggregate limit on contributions to all candidate committees combined.

The compelling government interest justifying the base contribution limits is the same anti-corruption concern to prevent the *quid-pro-quo* exchange of campaign contributions for political favors. But that anti-corruption interest does not apply to the aggregate limit on all candidate contributions. All candidate contributions would still have to comply with the base contribution limits in any event.

The aggregate limit puts an absolute limit on the political speech and political association of any one individual or contributor, infringing on these most fundamental of constitutional rights. It prevents the contributor from contributing to any additional candidates once he or she has reached the limit. But that prohibition on contributing to any further candidates does not further any anti-corruption interest, beyond what is served by the base contribution limit that would continue to apply to any such further contributions even without the aggregate limit.

Most importantly, *there is no circumvention interest involved in the aggregate limit on candidate contributions, serving to enforce the base limit.* There is no potential that contributions to additional candidate committees once the aggregate limit has been reached can be contributed with the intent and expectation of providing further funds to candidates who have already been provided contributions by the same contributor up to the base limit.

If you have already contributed up to the base limit to the reelection campaign of California Senator Barbara Boxer, for example, contributing in addition up to the limit to the reelection campaign of Ohio Senator Sherrod Brown is not a viable way of getting additional funds to the Boxer campaign.

The real interest behind the aggregate limit on candidate committee contributions is really the equalizing interest that was rejected by this Court in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). The idea is that no one person should be allowed to contribute the allowed maximum to more than a few federal campaigns. But this Court rejected precisely that notion as a compelling state interest justifying restrictions on political speech and political association in *Citizens United*. The policy of the First Amendment, the Court recognized in *Citizens United*, is to maximize speech, and the liberty to choose to engage in it, not equalizing it through government regulation limiting speech.

The aggregate limit on candidate contributions is consequently also unconstitutional.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the decision of the court below, and find unconstitutional the aggregate limit on contributions to non-candidate committees, the aggregate limit on contributions to state and local parties and PACs, and the aggregate limit on contributions to candidate committees.

Respectfully submitted,

PETER J. FERRARA
Counsel of Record
20594 Woodmere Court
Sterling, VA 20165
(703) 582-8466
peterferrara@msn.com

Counsel for Amicus Curiae
American Civil Rights Union

May 8, 2013

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-536

Supreme Court, U.S.
FILED
JUL 24 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICANS FOR CAMPAIGN REFORM AS *AMICUS CURIAE* SUPPORTING APPELLEE

ROBERT J. DWYER
ALANNA C. RUTHERFORD
BOIES, SCHILLER
& FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
(212) 446-2300

CHARLES FRIED
Counsel of Record
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636
fried@law.harvard.edu

Counsel for Amicus Curiae

248610

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

A. Congress Intended BCRA To Be A More Flexible And Effective Means of Accomplishing The Same Anti-Corruption Goals This Court Has Previously Endorsed. 9

B. The *McCutcheon* Panel Recognized That Absent The Aggregate Limits, There Were Potential Channels For Large Sums Of Additional Money To Flow That Would Escape The Regulation Intended By The Base Limits. 12

C. BCRA's Aggregate Contribution Limits Are The "Least Restrictive" And Most Readily Administrable Method of Protecting Against The Circumvention of Anti-Corruption Mechanisms. 15

Table of Contents

Page

1. Absent Aggregate Limits, Existing Legislation Is Insufficient To Fulfill The Anti-Circumvention Purpose of BCRA. 16

2. Appellants Proffered Closely Drawn Alternatives Fail To Prevent The Anti-Corruption And Anti-Circumvention Goals Of The Current FECA Legislation.. 19

3. *Citizens United* Does Not Alter The Propriety of Anti-Circumvention Measures Or Their Analysis.. 23

CONCLUSION 25

TABLE OF CITED AUTHORITIES

Page

CASES

Allnet Commc'n Serv., Inc. v. Nat'l Exch. Carrier Ass'n, Inc., 965 F.2d 1118 (D.C. Cir. 1992) 14

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) 2, 23

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

California Medical Association v. FEC, 453 U.S. 182 (1981) 6

Citizens United v. FEC, 558 U.S. 310 (2010) ..... *passim*

FEC v. Colo. Republican Fed. Campaign Comm. ("Colorado II"), 533 U.S. 431 (2001) 6, 8, 13, 18

FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) 6, 7

FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 5, 6

Cited Authorities

Page

FEC v. Nat'l Right to Work Comm.,
459 U.S. 197 (1982) 6

FEC v. Wisconsin Right To Life,
551 U.S. 449 (2007) 7

Harris v. United States,
336 U.S. 545 (2002) 2

McConnell v. FEC,
540 U.S. 93 (2003) ..... *passim*

McCutcheon v. FEC,
No. 12-1034 (D.D.C. Sept. 28, 2012) ..... *passim*

Nat'l Wildlife Fed'n v.
U.S. Army Corps of Engineers,
384 F.3d 1163 (9th Cir. 2004) 14

Nixon v. Shrink Missouri Gov't PAC,
528 U.S. 377 (2000) 4, 22

Randall v. Sorrell,
548 U.S. 230 (2006) 2

Reasonover v. St. Louis Cnty., Mo.,
447 F.3d 569 (8th Cir. 2006) 14

Shays v. FEC, ("Shays II")
414 F.3d 76 (D.C. Cir. 2005) 9

Cited Authorities

Page

Shays v. FEC ("Shays III"),
528 F.3d 914 (D.C. Cir. 2008).....9, 10

Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622, 114 S. Ct. 2445,
129 L. Ed.2d 497 (1994).....22

Turner Broadcasting System, Inc. v. FCC,
520 U.S. 180 (1997).....12

United States v. IBM,
517 U.S. 843 (1996).....2

United States v. Sowers,
136 F.3d 24 (1st Cir. 1998).....14

Wis. Right to Life State Political Action Comm. v. Barland,
664 F.3d 139 (7th Cir. 2011).....5

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 4 4

STATUTES

2 U.S.C. § 441a(a)(5) 17, 18

2 U.S.C. § 441a(c).....3

2 U.S.C. § 441i 9

Page

OTHER AUTHORITIES

147 Cong. Rec. S2943-02 (daily ed. Mar. 27, 2001) (statement of Sen. Kerry) 11

147 Cong. Rec. S3233-06 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein) 11

147 Cong. Rec. S3233-06 (daily ed. Apr. 2, 2001) (statement of Sen. Kohl) 11

148 Cong. Rec. S2096-02 (daily ed. Mar. 20, 2002) (statement of Sen. Dodd) 11

148 Cong. Rec. S2096-02 (daily ed. Mar. 20, 2002) (statement of Sen. Grassley) 11

FEC, *Thirty Year Report* 5 (Sept. 2005), *available at* http://www.fec.gov 14

Investigation on Illegal or Improper Activities in Connection With the 1996 Federal Election Campaigns, the Minority Report: Executive Summary (March 1998), *available at* http://www.washingtonpost.com/wp-srv/politics/special 10

Jeanne Cummings, *2008 Campaign Costliest in U.S. History*, Politico (Nov. 5, 2008, 5:28 AM), http://www.politico.com/news/stories/1108/15283.html 21-22

Cited Authorities

Page

McCutcheon vs. FEC, OpenSecrets.org, http://www.opensecrets.org/overview/mccutcheon.php 17

The American Heritage Dictionary of the English Language 1652 (4th Ed. 2006) 9

Wright, Miller & Kane, 10A Federal Practice & Procedure § 2716 (3d ed.) 14

3 1998 Senate Report 4565 10

INTEREST OF AMICUS CURIAE

Americans For Campaign Reform ("ACR") is a nonpartisan 501(c)(3) organization, chaired by John Rauh, ACR's founder.[1] ACR is co-chaired by former Senators Bill Bradley, Bob Kerrey, and Alan Simpson. The President and Chief Executive Officer of ACR is Lawrence Noble, who worked at the Federal Election Commission ("FEC") for more than twenty years, serving as General Counsel from 1987 until 2000. Americans For Campaign Reform believes that the longstanding limits on the size of contributions imposed by national, state and local legislation are important to encouraging ordinary citizens to participate in the electoral process, by affirming their belief that their participation—by their support and by their votes—makes a difference. The Court has affirmed the principle that governments may, within a broad range, impose both base and aggregate contribution limits in every decision since *Buckley v. Valeo*, finding such limitations an important bulwark against forces that would undermine the confidence, and thus discourage the participation of ordinary citizens, in the electoral process.

---

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The Solicitor General has filed a blanket waiver with the Court consenting to the submission of all *amicus* briefs. Both petitioners have also consented and their consents are attached hereto.

SUMMARY OF ARGUMENT

Starting 37 years ago with *Buckley v. Valeo*, 424 U.S. 1, 58 (1976), and without exception in every case since, this Court has insisted on the distinction between contributions and expenditures, leaving the contribution limit amount to the judgment of the legislature within a broad range. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2817 (2011); *Randall v. Sorrell*, 548 U.S. 230, 241 (2006) (collecting cases). The regime of contribution limits enacted by Congress in the Federal Election Campaign Act ("FECA") in 1972 and approved in *Buckley* and in every legislative iteration since have included a limit not only on direct contributions to individual candidates and committees ("base limits"), but also aggregate limits. It is the aggregate limits that Appellants attack.[2]

The Court's consistent justification for contribution limits of both kinds has been the prevention of corruption or the appearance of corruption. *See Citizens United v.*

---

2. The campaign finance regime currently in place with the inclusion of base and aggregate limits began 42 years ago with the passage of FECA and the inclusion of base and aggregate limits in each iteration of those laws has been upheld by this Court. In turn, states have reframed their own campaign finance laws to conform with the constitutional framework upheld since *Buckley*. Overturning that framework will have collateral impact beyond just the pronouncements of Congress. *See United States v. IBM*, 517 U.S. 843, 856 (1996) (*stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process"); *Harris v. United States*, 336 U.S. 545, 556-57 (2002) (recognizing the fundamental importance of *stare decisis*).

FEC, 558 U.S. 310, 360 (2010). Whatever space may be left between these forbidden rationales and outright bribery (which is, of course, subject to criminal law) is the space that base contribution limits occupy. At the time the case was initially heard, any individual could contribute $2,500 to a candidate, $30,800 to each national political party or committee, $10,000 to any state party political committee, and $5,000 to any other political committee per election cycle. *See McCutcheon v. FEC*, No. 12-1034, slip op. at 2-3 (D.D.C. Sept. 28, 2012) (citing legislative and regulatory provisions).[3] The three-judge panel of the lower court has shown that without aggregate limits, a contributor may annually contribute as much as $3,500,000, all of which might without any violation of law directly or indirectly be used to support an individual candidate. *Id.* at 3.

In this brief, *amicus* demonstrates that the sum is much greater than that, given the possibility of a potentially unlimited number of political action committees ("PACs") to which a contributor may make contributions up to the base limit set for contributions to such committees. Each such committee may then make contributions to individual candidates. In view of the iron rule that in political campaigns whatever may lawfully be done will be done, without aggregate contribution limits,

---

3. The limits are adjusted biannually for inflation. 2 U.S.C. § 441a(c). Although the above cites the contribution limits when the case was first litigated, the 2013-2014 contribution limits by an individual are now capped at $123,200 annually, with a base limit of $2,600 for candidates and $32,400 to national parties and committees. The base limits to any state and local party political committee and other political committees remained the same at $10,000 and $5,000 respectively. *See* http://www.fec.gov/info/contriblimitschart1314.pdf.

the amount of money that a contributor can hope to direct to a chosen candidate is virtually limitless.

Base limits are a longstanding, familiar, and approved legislative safeguard against corruption or its appearance. This Court has previously established that Congress acted with sufficient reason in concluding that the concerns that justify the base limits on direct contributions extend to justify setting aggregate limits. Congress is therefore entitled to prevent such potentially unlimited contributions from entering campaigns through what would soon become only a slightly indirect route. *See Citizens United*, 558 U.S. at 459 ("on account of the extreme difficulty of proving corruption, 'prophylactic measures, reaching some [campaign spending] not corrupt in purpose or effect, [may be] nonetheless required to guard against corruption.'" (quoting *Buckley*, 424 U.S. at 30; *see Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392, n.5 (2000)).[4]

Finally, *amicus* demonstrates that the changes in the earlier regime wrought by the Bipartisan Campaign Reform Act (BCRA) and other adjustments in that regime—particularly provisions treating as one committee several committees set up in association with each other (anti-proliferation rules), and provisions counting against a contributor's base limit contributions explicitly earmarked to that candidate (anti-earmarking rules)—are quite inadequate to protect the integrity of the regime of base limits. The alternatives proposed by

---

4. Appellants also do not challenge Congress's constitutionally granted power to regulate federal elections. *See* U.S. Const. art. I, § 4.

Appellants are—to the extent that one can understand them at all—complex, unadministrable, and ineffective.

ARGUMENT

It is well established that there is a "legitimate and compelling government interest in preventing corruption or the appearance of corruption," namely the reality or appearance of *quid pro quo* arrangements between candidates and those making contributions. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496–97 (1985); *see also Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 153 (7th Cir. 2011) (reiterating that "preventing actual or apparent *quid pro quo* corruption is the *only* interest the Supreme Court has recognized as sufficient to justify campaign finance restrictions"). As the *Buckley* Court pointed out, unlimited contributions present a danger of *quid pro quo* corruption because it is "difficult to isolate suspect contributions." 424 U.S. at 30. As such, aggregate contribution limits, in addition to base contribution limits, were found to be a "quite modest restraint upon protected political activity [which] serves to prevent evasion" of the contribution limits. *Id.* at 38. This "additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." *Id.*

"[M]ore importantly, Congress was justified in concluding that the interest in safeguarding against the *appearance* of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* (emphasis added). Even

while acknowledging that "few if any contributions to candidates will involve *quid pro quo* arrangements," the *Citizens United* Court most recently explained that contribution limits have been repeatedly upheld since *Buckley* for the reason that they are "preventative." 558 U.S. at 357 (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S.238, 260 (1986); *Nat'l Conservative Political Action Comm.* 470 U.S. at 500; *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982)); *Buckley,* 424 U.S. at 39 (upholding FECA's aggregate contribution limits as a "quite modest restraint" that served "to prevent evasion of the $1,000 [then base] contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party"); *see also* FEC Mot. at 14 ("This Court's decision in *California Medical Association v. FEC,* 453 U.S. 182 (1981), confirms that aggregate limits and limits on contributions to political committees can permissibly coexist under the First Amendment.").

Similarly, this Court has also already concluded that anti-circumvention is a worthy goal and that there are not "better crafted safeguards" that make aggregate limits unnecessary. *FEC v. Colo. Republican Fed. Campaign Comm.* ("*Colorado II*"), 533 U.S. 431, 462 (2001); *McConnell v. FEC*, 540 U.S. 93, 144 (2003) ("because the First Amendment does not require Congress to ignore the fact that 'candidates, donors, and parties test the limits of the current law, these interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits") (quoting *Colorado II,* 533 U.S. at 456–57 ("all Members of the Court agree that circumvention is a valid theory of corruption")).

Appellants seek to constrain recourse to the anti-circumvention rationale, by invoking the Chief Justice's dismissal of a different rule in a different context as "prophylaxis upon prophylaxis". *See* RNC Br. 30-31, 51. But Appellants ignore that that remark was made in response to a purported justification for limiting the form and content of *expression* by an entity speaking independently of any candidate, *see FEC v. Wisconsin Right To Life*, 551 U.S. 449, 479 (2007), and unconnected to the making of contributions, which is what is at issue in this case.

Because Appellants do not challenge BCRA's base limits on contributions, McCutcheon Br. 17–20; RNC Br. 6–7, they cannot deny that base limits are compatible with First Amendment freedoms of expression and association. *See McCutcheon*, slip op. at 9 ("Plaintiffs do not, however, challenge the base contribution limits, so we may assume they are valid expressions of the government's anticorruption interest."). Rather, Appellants object to the regime of aggregate limits.

Thus, the only question before the Court is whether BCRA's aggregate limits are closely drawn to prevent the circumvention of anti-corruption measures.[5] They are.

---

5. The Court's previous decisions have all made clear strict scrutiny review does not apply to contributions. *See Buckley*, 424 U.S. at 25 ("In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'"); *McConnell* , 540 U.S. at 136; *Mass. Citizens for Life, Inc.*, 479 U.S. at 259–260 ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."). Contrary to Appellants' suggestion, however, even if strict scrutiny review

Appellants ignore the three-judge panel's determination that the base contribution limits alone will not prevent the unlimited flow of money (and, hence, at the very least the appearance of corruption) into campaigns. Instead, Appellants invite the Court to rely upon Appellants' judgment or to substitute its own judgment for that of Congress's as to what would constitute better and less restrictive alternative measures of regulation. Appellants, however, offer scant detail regarding what these supposedly more narrowly drawn but equally effective measure would look like.

---

did apply to this case, the district court's decision should still be upheld, as it reviewed the record in this case and relied in the extensive record evidence about BCRA acquired from previous cases to support its decision. *See McCutcheon*, slip op. at 9-10 (citing *McConnell*, 540 U.S. at 146 ("The evidence in the record shows that candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries. Thus, despite FECA's hard-money limits on direct contributions to candidates, federal officeholders have commonly asked donors to make soft-money donations to national and state committees 'solely in order to assist federal campaigns,' including the officeholder's own."); *Colorado II*, 533 U.S. at 458-459 & n. 22 (discussing the practice of tallying donations and citing to the declarations of various senators noting the correlation between money received by the candidate from the committee and how much the candidate encouraged donors to donate to committee)).

A. Congress Intended BCRA To Be A More Flexible And Effective Means of Accomplishing The Same Anti-Corruption Goals This Court Has Previously Endorsed.

The legislative history of the Bipartisan Campaign Reform Act of 2002, which amends FECA, demonstrates that Congress passed BCRA to accomplish the same anti-corruption goal by increasing the penalties for violating the conduit-contribution limitations and introducing measures specifically designed to regulate "soft money." *See* 2 U.S.C. § 441i.

Before BCRA, FECA limited only "federal" or "hard" money contributions. *See McConnell*, 540 U.S. at 122. Contributions known as "soft money" were not subject to caps. *Id.* at 122–23.[6] As this Court explained in *McConnell* in upholding the soft-money bans in BCRA, "national parties transferred large amounts of their soft money to the state parties, which were allowed to use a larger percentage of soft money to finance mixed-purpose activities under FEC rules." *Id.* at 124. Soft-money contributions were "dramatically larger than the contributions of hard money permitted by FECA." *Id.* Significantly, "[n]ot only were such soft-money

---

6. "Over time, 'contributions subject to [FECA's] source, amount, and disclosure requirements' came to be known as 'hard money,' *Shays v. FEC*, 414 F.3d 76, 80 (D.C. Cir. 2005) ("*Shays II*"), while '[p]olitical donations made in such a way as to avoid federal regulations or limits' came to be known as 'soft money,' The American Heritage Dictionary of the English Language 1652 (4th Ed.2006); *see also Shays II*, 414 F.3d at 80 (defining 'soft money' as '[f]unds outside FECA's sphere')." *Shays v. FEC*, 528 F.3d 914, 917 (D.C. Cir. 2008) ("*Shays III*").

contributions often designed to gain access to federal candidates, but they were in many cases solicited by candidates themselves. . . . The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections." *Id.* at 125–26. The *McConnell* Court was particularly concerned about unregulated money – local and state election money – finding its way into federal elections; so one may think of soft money as any money outside of prescribed contribution limits that is used to undermine the campaign finance regime those contribution limits seeks to put in place. *See Shays III*, 528 F.3d at 917.

A 1998 Senate Report argued that soft-money contributions caused "campaign abuses." *McConnell*, 540 U.S. at 180 (quoting 3 1998 Senate Report 4565). The Report further explained that the soft-money loophole "eviscerated the contribution limits . . . in federal election laws and caused a loss of public confidence in the integrity of our campaign finance system." *Investigation on Illegal or Improper Activities in Connection With the 1996 Federal Election Campaigns, the Minority Report: Executive Summary* (March 1998), *available at* http://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/demsummary.htm. Thus, Congress engaged in an effort "to plug the soft-money loophole," which became the purpose of Title I of BCRA. *McConnell*, 540 U.S. at 180.

Numerous Senators stated that they voted for BCRA's regime of clear base and aggregate limits, with no opportunity for circumvention by various "soft money" devices in order to limit the corruption and appearance

of corruption arising from contributions far in excess of prescribed base limits. *See* 148 Cong. Rec. S2096-02 (daily ed. Mar. 20, 2002) (statement of Sen. Dodd) (arguing that soft-money contributions create "a corrupting influence, suggesting that large contributions by donors to officeholders, candidates, and political parties provide those donors with preferred access and influence over public policy," and that "the public perception of even the appearance of corruption erodes public confidence in the integrity of our electoral process"); 147 Cong. Rec. S3233-06 (daily ed. Apr. 2, 2001) (statement of Sen. Feinstein) ("These gigantic contributions are what warp our politics and cause people to lose faith in our Government and they must be halted. They give the appearance of corruption."); 147 Cong. Rec. S2943-02 (daily ed. Mar. 27, 2001) (statement of Sen. Kerry) (citing statistics showing that "overwhelming majorities think special interest contributions affect the voting behavior of Members of Congress"); 147 Cong. Rec. S3233-06 (daily ed. Apr. 2, 2001) (statement of Sen. Kohl) (arguing that Congress "must combat the perception of corruption," and that the "presence of unlimited political contributions" either is corrupting or "creates the appearance of corruption"). Even Senators who opposed the bill agreed that large individual contributions pose a risk of corruption. For example, Senator Grassley stated that "[e]ffective limitations on soft money are necessary to reduce real and perceived corruptions in the system." 148 Cong. Rec. S2096-02 (daily ed. Mar. 20, 2002) (statement of Sen. Grassley).

Because it is difficult to know what the next method of circumventing the campaign finance laws will be, Congress is entitled to some leeway in balancing the

constitutional and prudential concerns addressed by the aggregate contribution limits that BCRA established. *See Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 196 (1997) ("Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy"); *McConnell*, 540 U.S. at 95.

B. The *McCutcheon* Panel Recognized That Absent The Aggregate Limits, There Were Potential Channels For Large Sums Of Additional Money To Flow That Would Escape The Regulation Intended By The Base Limits.

The three-judge panel that decided Appellants' claims recognized that "[u]nder the base contribution limits, for example, an individual could contribute as much as $3.5 million to one party and its affiliated committees in a single election cycle." *McCutcheon*, slip op. at 3. The panel also recognized that "[t]his $3.5 million, moreover, does not include contributions to PACs, a sum that would equal $5,000 multiplied by whatever number of PACs an individual desires to give to." *Id.* at n.1. As such, the panel recognized that base limits alone were inadequate protection against corruption or the appearance of corruption without the addition of the aggregate contribution limits. *See id.* at 9. Without the aggregate limits, nothing would prevent an individual contributor from giving checks of hundreds of thousands dollars, if

not over a million dollars, more to a presidential joint fundraising committee that consisted of national and state party committees supporting a particular candidate. Base contribution limits also do not prevent individuals from contributing the base amount to a virtually limitless number of committees likely to support a particular candidate, thereby permitting individuals to circumvent the spirit and purpose of BCRA.

In reviewing whether BCRA's aggregate contribution limits were closely drawn to prevent circumvention of FECA base limits, the panel specifically reviewed what would happen if an individual gave a single check to a joint fundraising committee for half a million dollars. *Id.* at 9–10. While the committees are required to divide the money after a fundraiser, because party committees can transfer unlimited amounts of money to other party committees, the money may still find its way to a single committee's coffer which then might use the money for coordinated expenditures, which have "no significant functional difference from the party's direct candidate contributions." *Id.* (citing *Colorado II*, 533 U.S. at 460 ("The candidate who knows the coordinated expenditure derives from that single large check at the joint fundraising event will know precisely where to lay the wreath of gratitude.")). Although the panel noted that such coordination between a large number of entities in service of a single contributor's interests may seem unlikely, "there is no reason to think the quid pro quo of an exchange depends on the number of steps in the transaction." *Id.* at 10 (citing *McConnell*, 540 U.S. at 155). This daisy-chain scenario is exactly what several senators noted was happening prior to BCRA that led to

its passage.[7] *See* FEC, *Thirty Year Report* 5 (Sept. 2005), *available at* http://www.fec.gov/info/publications/30year.pdf (political "parties frequently asked federal candidates and officeholders to help raise large soft money donations, offering donors access to current and future federal legislators and raising concerns about potential corruption or the appearance of corruption").

Indeed, it is not a far leap to imagine that a contribution would not have to be earmarked for a particular candidate to understand, for example, that PACs such as Indianans for a Better Congress, Hoosiers for a More Liberal Congress, and Accountants for a Congress That Counts will all use their funding to support the same candidate

---

7. Even if the reasoning of the panel did not explicitly rely on this possibility, it noted the potentially unlimited contributions to PACs. Slip op. at n.1. This Court may still affirm the result based on that rationale. *See Reasonover v. St. Louis Cnty., Mo.*, 447 F.3d 569, 578–79 (8th Cir.2006) ("this court may affirm for any reason supported in the record, even if that reason is different from the rationale of the district court"); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1170 (9th Cir. 2004) ("We may affirm on any ground supported by the record even if it differs from the rationale of the district court."); *United States v. Sowers*, 136 F.3d 24, 28 (1st Cir. 1998) ("Mindful that we are not chained to the lower court's rationale but may affirm on any alternative ground supported by the record, we choose to follow a different analytic path."); *Allnet Commc'n Serv., Inc. v. Nat'l Exch. Carrier Ass'n, Inc.*, 965 F.2d 1118, 1119 (D.C. Cir. 1992); *see also* Wright, Miller & Kane, 10A Federal Practice & Procedure § 2716 (3d ed.) ("The appellate court does not have to affirm a decision on a Rule 56 motion for the same reasons that persuaded the court below to grant the motion. On the contrary, it can find another ground for concluding that the movant is entitled to judgment as a matter of law and ignore any erroneous basis that the district court may have employed").

and that contributions made to each of them will either directly or indirectly find their way to the candidate. Similarly, it is equally plausible that a large donor may call up a PAC and state that he is considering giving money to the PAC and has already given to Jones, and ask whether the PAC has also considered supporting Jones. Either method would permit an individual to utilize unearmarked contributions to give additional money to Jones that would be outside of the reach of the intended base contribution limits.

Whether or not such indirect contributions to committees when taken in the aggregate might be less valuable to a candidate than an equivalent contribution made directly to the candidate, Congress was justified in fearing that such an arrangement could give rise to the same appearance or reality of *quid pro quo* corruption as contributions above the base limits. Indeed, Congress's findings concerning candidates' receipt of mediated funds prior to BCRA supports the conclusion that permitting limitless contributions through intermediaries would lead to corruption or its appearance. *McConnell*, 540 U.S. at 122–26 (discussing legislative history).

C. BCRA's Aggregate Contribution Limits Are The "Least Restrictive" And Most Readily Administrable Method of Protecting Against The Circumvention of Anti-Corruption Mechanisms.

Appellants recognizing the weakness in their argument that BCRA's aggregate limits serve no constitutionally permissible purpose and thus are an unjustified limitation on First Amendment rights, *see* RNC

Br. 20-21; McCutcheon Br. 21-30,contend instead that there must be less confining means of achieving the legitimate anti-circumvention purpose. They never clearly explain, however, what these alternatives would be and exactly how they would work. Indeed, Appellants' proffered alternative means of preventing corruption or its circumvention either do not exist or are impractical. Because the stated alternative solutions cannot be established as more workable and there is a large legislative record on the need to prevent the circumvention of contribution limits, the aggregate contribution limits, which do so, should stand.

1. Absent Aggregate Limits, Existing Legislation Is Insufficient To Fulfill The Anti-Circumvention Purpose of BCRA.

Appellants contend that provisions in existing legislation would be sufficient to prevent corruption or its appearance without recourse to aggregate limits. *See* McCutcheon Br. 40-43; RNC Br. 26-43. Each of those limitations standing alone or in conjunction fails to provide the anti-circumvention protection that aggregate limits provide.

First, as noted by the three-judge panel, BCRA's base contribution limits fail to adequately prevent corruption or its appearance without the addition of the aggregate contribution limits. *McCutcheon*, slip op. at 9 ("we cannot ignore the ability of aggregate limits to prevent evasion of the base limits."). Base contribution limits do nothing to prevent individuals from contributing the base contribution amount to an unlimited number of committees likely to support a particular candidate, thereby permitting individuals to circumvent the base limits. In affirming the

aggregate limits, the district court panel noted the use of committees as a way to circumvent base limits against which BCRA's regime of aggregate limits protects. *Id.* at 9–10. For example, in the 2000 election cycle – which took place before the BCRA's aggregate limits came into effect – 515 individuals made soft money contributions to the committees of the Democratic and Republican Party in amounts ranging from $100,000 to more than $1 million. *See McCutcheon vs. FEC*, OpenSecrets.org, http://www.opensecrets.org/overview/mccutcheon.php (citing to data released by the FEC on April 16, 2013). These are exactly the types of very large contributions that were prohibited by BCRA's soft money ban, which was affirmed as constitutional by this Court. *See McConnell*, 540 U.S. at 225; RNC Br. 36. Thirteen years later, one could only imagine what those amounts would be, had Congress not acted to eliminate the influence of soft money. To be sure, such indirect contributions through committees might be less valuable to a candidate than equivalent contributions made directly to the candidate, but it hardly follows that this device does not give rise to the appearance or reality of *quid pro quo* corruption. Indeed, Congress's findings concerning candidates' use of party committees to divert soft money to federal elections supports the conclusion that permitting limitless mediated contributions does lead to corruption or its appearance. *McConnell*, 540 U.S. at 122–26.

Second, BCRA's existing anti-proliferation rule, which treats all contributions made by affiliated committees as a contribution from a single committee, 2 U.S.C. § 441a(a)(5), is not an adequate substitute for the aggregate contribution limits. The rule is limited by its terms to contributions made by political committees "established or financed

or maintained or controlled" by a single corporation, labor organization, or other person. *Id.* Appellants do not argue, and there is nothing in the legislative record that would support an argument, that individuals could not circumvent the base contribution limits by contributing to multiple committees likely to support a single candidate, but lacking a relationship sufficient to qualify as a single committee under § 441a(a)(5).

Third, Appellants' argue that BCRA's earmark provision, in which contributions earmarked for specific candidates are deemed direct contributions to the candidate, is sufficient to prevent corruption or the appearance of corruption. *See* McCutcheon Br. 50; RNC Br. 39-42. This "ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions." *Colorado II*, 533 U.S. at 462. Under "actual political conditions", earmarking provisions "reach only the most clumsy attempts to pass contributions through to candidates" and cannot be treated as "the outer limit of acceptable tailoring." *Id.* Thus, the very generous aggregate limits in conjunction with other parts of the legislation are sufficiently narrowly tailored to serve the anti-corruption and anti-circumvention goals without trampling on First Amendment association protections.

The fact that a receiving candidate, party, or committee chooses how to spend unearmarked funds, *see* McCutcheon Br. 40-42, does not eliminate the danger of corruption or its appearance. Appellants' argument that such discretion effectively "cleanses" any corruption risk ignores the contrary recognition in *Buckley*, and the specific Congressional findings underlying BCRA, that "unearmarked contributions to political committees

likely to contribute to [a given] candidate" can give rise to corruption or the appearance of corruption. 424 U.S. at 39. Committees' spending patterns are generally sufficiently predictable for a candidate to consider a contribution to be of some benefit, whether financial or political. For example, the *McConnell* Court noted that, before BCRA's passage, candidates often "directed potential donors to party committees and tax-exempt organizations that could legally accept soft money" to circumvent direct contribution limits. *Id.* at 125.

Appellants have offered no basis for calling into question Congress's findings that candidates solicited money contributions from individuals who had already met the base contribution limits in exchange for political favors. Such an arrangement clearly constitutes a corrupting *quid pro quo* arrangement. BCRA's base contribution limits, anti-proliferation rule, and earmarking provisions alone cannot prevent its occurrence without the aggregate contribution limits.

2. Appellants Proffered Closely Drawn Alternatives Fail To Prevent The Anti-Corruption And Anti-Circumvention Goals Of The Current FECA Legislation.

Equally important, Appellants proffered alternatives do not protect against the risks at issue. *See McCutcheon* Br. 60–61. For example, the segregated non-transferable accounts proposed by McCutcheon provide no solution, *id.* at 61, because at some point the candidate will be able to use those funds and will know whom to thank and patronize for them. Putting aside that Appellants fail to provide sufficient detail so that the operation of

this untested arrangement could be understood, the potential flaws in such an idea are manifest. For example, Appellants' solution would mean that if an individual decides to contribute $1 million over the limit for individual donations, while those funds could not be drawn down immediately, they could be over time, creating a sustained influence whenever the candidate went to his or her account. The public perception of a donor ATM machine (that is, a segregated fund to which a candidate could turn again and again) would wreak the havoc on the system that campaign finance legislation is intended to avoid.

Moreover, replacing the aggregate contribution limit with an aggregate contribution "threshold" for individuals, funds in excess of which would be deposited into a segregated account, *id.* at 18, ignores the fungibility of funds. For example, a committee could easily separate a contribution from a given individual that exceeds any aggregate threshold and put it towards some permissible but necessary use, thereby freeing contributions from two other individuals (neither of whom had yet reached the aggregate threshold) to fund a candidate's campaign. From the candidate's perspective, notwithstanding this maneuvering, it is still the first individual's large contribution that produced the benefit. In addition, the practical difficulties in monitoring and enforcing such a complex scheme cannot be ignored.

Similarly, solutions that focus solely on increased regulation of joint fundraising committees or transfers among political party committees, *see id.* at 60–61, fail to address the danger that other political committees could be easily and rapidly formed to accept individual contributions in order to circumvent the base contribution limits. Such a solution may also be impractical, as it would

require a significant amount of review of the accounting of these committees by the FEC to establish a violation. The damage would likely already be accomplished by the time the books were reviewed and any use of diverting accounting mechanisms understood.

The aggregate contribution limits enacted in BCRA are a constitutionally appropriate accommodation of Congress's interest in preventing individuals from directing limitless funds to candidates in a manner that gives rise to corruption or its appearance, while preserving individuals' ability to support multiple candidates.[8] BCRA itself is the more narrowly-tailored alternative by permitting biannual inflation adjusted contribution limits and tightening limitations on conduit-contributions. A leading post-BCRA example is the 2008 presidential election, in which more money was raised and spent than in any previous presidential campaign, while also increasing the overall number of contributors. *See, e.g.*, Jeanne Cummings, *2008 Campaign Costliest*

---

8. Indeed, Appellants recognize that BCRA does not prevent individuals from supporting *every* federal candidate for election; they simply object that, the more candidates an individual chooses to support, the lower the *amount* of the average contribution. But, as this Court has held, "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution." *Buckley*, 424 U.S. at 21. Specifically, Appellant McCutcheon states that he wishes to make twelve additional candidate contributions in the amount of $1,776, but may not do so because of BCRA's aggregate limits. McCutcheon Br. 12. Although McCutcheon's choice of the amount he would like to contribute has historic-patriotic associations, the significance of the amount does not convert that prohibited act to a speech act deserving full First Amendment protection, like the burning of the American Flag. Were it otherwise, a restriction on Freedom Tower's projected height of 1776 feet would raise First Amendment concerns.

in U.S. History, Politico (Nov. 5, 2008, 5:28 AM), http://www.politico.com/news/stories/1108/15283.html. Surely, associational and free speech rights cannot have been so severely weakened when greater financial participation by larger numbers of citizens was and still is possible.

Finally, Appellants also contend that because they can conceive of means by which the aggregate limitations could be circumvented, neither the aggregate contribution limits nor the goal of anti-circumvention can stand. McCutcheon Br. 44–48. This simply makes no sense. While those who seek to subvert the law may be able to find a way to do so, it is little justification for no law at all. The aggregate contribution limits seek to fill the void of both envisioned and unforeseen loopholes that would undermine the entire base contribution limit regime. Congress has done so in a manner that imposes minimal burden on citizens while preventing a host of potential ills. *See McConnell*, 540 U.S. at 165-66.[9]

---

9. "Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to § 323(a) by scrambling to find another way to purchase influence. It was "neither novel nor implausible," *Shrink Missouri*, 528 U.S. at 391, 120 S.Ct. 897, for Congress to conclude that political parties would react to § 323(a) by directing soft-money contributors to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties. We "must accord substantial deference to the predictive judgments of Congress," *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality opinion), particularly when, as here, those predictions are so firmly rooted in relevant history and common sense. Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest."

3. *Citizens United* Does Not Alter The Propriety of Anti-Circumvention Measures Or Their Analysis.

Appellants and their amici suggest that the world after *Citizens United* should be one in which anything goes, because, they contend, money will now be funneled to independent expenditure-only PACs ("Super PACs"), putting candidates constrained by the aggregate contribution limit at some unspecified competitive disadvantage. *See, e.g.*, McConnell Br. 26–27; *see also* McCutcheon Br. 51.

This argument ignores the basic reasoning underpinning the *Citizens United* Court's analysis—namely, that independent expenditures do not give rise to corruption or the appearance of corruption because they are, *by definition*, not coordinated with a candidate. The "inherent opportunity" for corruption or its appearance presented by large contributions, as distinct from expenditures, is supported by *Buckley* and Congressional findings, and not questioned by *Citizens United*. And it must not be forgotten that—in spite of Appellants' penchant for deploying quotations from cases that concern expenditure not contribution limits—the limits in issue in this case apply only to contributions and have no application to expenditures. *See Citizens United*, 558 U.S. 310.

Aggregate limits prevent the filtering of this unfettered money back into the heavily regulated campaign finance system, while respecting the freedom of expression that decisions from *Buckley* through *Citizens United* and *Arizona Free Enterprise* sought to protect. In other words, BCRA's aggregate contribution limits serve

the same anti-circumvention interest that was served by aggregate contribution limit upheld in *Buckley*.

Moreover, Appellants' argument assumes that there is an interest in limiting the robust political debate carried on by independent expenditure groups, suggesting that such debate is undesirably "negative." *See* McCutcheon Br. 30. Whether the content of Super PAC speech is "desirable" or not is irrelevant. The very inquiry is at war with the premise of *Citizens United*.

Because "[m]oney, like water, will always find an outlet," *McConnell*, 540 U.S. at 224, aggregate limits became Congress's attempt to prevent the undermining of the campaign finance regime through imposition of a reasonable restriction that did not unduly impinge on First Amendment rights. Appellants cannot establish that undue impingement exists and that the tangible harms to the campaign finance law will not be felt either through eliminating the aggregate limits altogether or imposing some untried supposed more closely drawn alternative.

CONCLUSION

For the reasons set forth above, and in the briefs of Appellee Federal Election Commission, *amicus* Americans for Campaign Reform urges the Court to affirm the judgment of the three-judge panel.

Dated: July 24, 2013

Respectfully submitted,

ROBERT J. DWYER
ALANNA C. RUTHERFORD
BOIES, SCHILLER
& FLEXNER LLP
575 Lexington Avenue
New York, NY 10022
(212) 446-2300

CHARLES FRIED
Counsel of Record
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636
fried@law.harvard.edu

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON and REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Appellants,

—v.—

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

J. ADAM SKAGGS
DAVID W. EARLEY
BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, New York 10013

DANIEL F. KOLB
Counsel of Record
JESSICA K. FOSCHI
MICHAEL E. MCGOVERN
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
daniel.kolb@davispolk.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. From the Founding of Our Government Through to the Present Day, Efforts To Protect the Integrity of the Democratic System of Government Have Been Considered To Be Imperative. 4

A. The Founders were concerned with the integrity of the new form of government and the People's confidence in that government. 4

B. The First Amendment reflects the Founders' concern for the integrity of the new system of democratic self-government and the People's confidence in that government... 11

C. When factions have threatened the People's faith in democracy, the Congress has acted to reform campaign finance practices..... 14

i) The excesses of the Gilded Age and resulting reforms of the Progressive Era..... 14

TABLE OF CONTENTS—Continued

Page

ii) Campaign finance abuses in the Watergate Era and the post-Watergate reforms 19

II. Preventing Corruption and the Appearance of Corruption Are Aspects of a More Fundamental Governmental Interest in Preserving the Integrity of Self-Government. 25

A. This Court has long recognized these interests as being the basis on which contribution limits are upheld. 25

B. Concerns about the perception of corruption are well founded. 29

III. The Results of Striking Aggregate Contribution Limits Must Be Assessed Against This Background 30

A. Eliminating aggregate limits would render the underlying contribution limits virtually meaningless 30

B. Were contributions to candidates and parties effectively unlimited, they would follow the pattern of contributions to super PACs 33

TABLE OF CONTENTS—Continued

Page

C. Permitting a tiny class of donors making enormous contributions to dominate political giving would give rise to extraordinary corruption risks..... 35

IV. The Validity of Campaign Contribution Limits Should Be Determined by a Review Cognizant of the Fundamental Interests in Maintaining Both the Integrity of Government and Public Confidence in that Government..... 37

CONCLUSION..... 39

TABLE OF AUTHORITIES

Page

CASES

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,
131 S. Ct. 2806 (2011) 12

Buckley v. Valeo,
424 U.S. 1 (1976) 11, 25, 26, 35, 37

Citizens United v. FEC,
558 U.S. 310 (2010) 25

Ex parte Yarbrough,
110 U.S. 651 (1884) 27, 28, 29

FEC v. Beaumont,
539 U.S. 146 (2003) 37

FEC v. Nat'l Right to Work Comm.,
459 U.S. 197 (1982) 26, 27

FEC v. Wis. Right to Life, Inc.,
551 U.S. 449 (2007) 25

First Nat'l Bank of Bos. v. Bellotti,
435 U.S. 765 (1978) 26

McConnell v. FEC,
540 U.S. 93 (2003) 31, 32, 36, 37

TABLE OF AUTHORITIES—Continued

Page

Nixon v. Shrink Mo. Gov't PAC,
528 U.S. 377 (2000) 5, 25

Randall v. Sorrell,
548 U.S. 230 (2006) 25, 37

SpeechNow.org v. FEC,
599 F.3d 686 (D.C. Cir. 2010) 33, 34

United States v. Automobile Workers,
352 U.S. 567 (1957) 27

United States v. Miss. Valley Generating Co.,
364 U.S. 520 (1961) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 6, cl. 1 8

U.S. Const. art. I, § 6, cl. 2 8

U.S. Const. art. I, § 7, cl. 1 8

STATUTES, REGULATIONS & RULES

2 U.S.C. § 441i(e) 32

2 U.S.C. § 441a(a)(4) 32

TABLE OF AUTHORITIES—Continued

Page

11 C.F.R. § 102.17(c)(5) 32

11 C.F.R. § 110.3(c) 32

Hatch Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147 (1939) 19

Labor Relations Management Act, 1947 ("Taft-Hartley Act"), Pub. L. No. 80-101, 61 Stat. 136 (1947) 19

Publicity of Political Contributions Act, Pub. L. No. 61-274, 36 Stat. 822 (1910) 19

Pub. L. No. 62-32, 37 Stat. 25 (1911) 19

Pub. L. No. 506, Title III, 43 Stat. 1070 (1925) 19

Sup. Ct. R. 37 1

OTHER AUTHORITIES

2 Samuel Eliot Morison & Henry Steele Commager, *The Growth of the American Republic* (4th ed. 1950) 27

120 Cong. Rec. 27228 (1974) (statement of Rep. Gaydos) 23

TABLE OF AUTHORITIES—Continued

Page

147 Cong. Rec. 3865 (2001)
(statement of Sen. Feingold) 24

147 Cong. Rec. 5198 (2001)
(statement of Sen. Kohl) 24

148 Cong. Rec. 1306 (2002)
(statement of Rep. Shays) 24

148 Cong. Rec. 3559 (2002)
(statement of Sen. Dodd) 24, 25

148 Cong. Rec. 3575 (2002)
(statement of Rep. Levin) 25

Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L.J. 871 (2004) 15, 16

Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (1948) 4, 12

Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245 13

Alfred Henry Lewis, *Mark Hanna, M'Kinley, and the Labor Unions*, News and Observer (Raleigh, N.C.), Aug. 9, 1896 16

Bernard Bailyn, *The Ideological Origins of the American Revolution* (enlarged ed. 1992) 9

TABLE OF AUTHORITIES—Continued

Page

Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections* (2013) 34, 35

Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & Pol'y 1 (1997) 16

Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. Rev. L. & Soc. Change 602 (2011) 17

Ciara Torres-Spelliscy, *How Much Is An Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16 Chap. L. Rev. 71 (2012) 20

CNN Opinion Research Corporation, *Poll: June 3-7, 2012*, CNN.com (June 9, 2011) http://i2.cdn.turner.com/cnn/2011/images/06/09/rel10d-2.pdf 29

Emily Swanson, *Campaign Finance Poll Finds Most Support Donation Limits*, Huffington Post (Feb. 22, 2013), http://www.huffingtonpost.com/2013/02/22/campaign-finance-poll_n_2743877.html 30

TABLE OF AUTHORITIES—Continued

Page

Federal Election Reform, 1973: *Hearings Before the Subcomm. on Privileges & Elections of the Committee on Rules & Admin.*, 93d Cong. 15 (1973) (statement of Sen. Mathias) 22

H.R. Rep. No. 93-1239 (1974) 22

H.R. Rep. No. 103-375 (1993) 23, 24

Huffington Post & YouGov, *Omnibus Poll*, Huffington Post (Feb. 2013), http://big.assets.huffingtonpost.com/cftoplines_split1.pdf 30

Jackson Lears, *Rebirth of a Nation: The Making of Modern America, 1877-1920* (2009) 16

James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol. 174 (1994) 9

John Locke, *Two Treatises of Government* (1821) 4

Kate Pickert, *Campaign Financing: A Brief History*, Time (June 30, 2008), http://www.time.com/time/nation/article/0,8599,1819288,00.html 17

Katherine Bacher, Univ. of Pittsburgh Sch. of Law, *U.S. Campaign Finance*, Jurist, http://jurist.org/feature/2013/07/us-campaign-finance.php 14

TABLE OF AUTHORITIES—Continued

Page

Lawrence Lessig, *Republic Lost* (2011) 7, 8

Melvin I. Urofsky, *Money and Free Speech: Campaign Finance Reform and the Courts* (2005) 15

Mescellany—Campaign Poetry: The Present-Taking President, 43 Prairie Farmer 267 (Chicago 1872) 15

Most Say Political Donors Get More than Their Money's Worth, Rasmussen Reports (Feb. 9, 2009), http://www.rasmussenreports.com/public_content/politics/general_politics/february_2009/most_say_political_donors_get_more_than_their_money_s_worth 29, 30

Notes of Debates in the Federal Convention of 1787 Reported by James Madison 40 (Bicentennial ed. 1987) 5, 7, 8

Notes of James Madison, *in* 1 *The Records of the Federal Convention of 1787* (Max Farrand ed. 1911) 10

Notes of James Madison, *in* 2 *The Records of the Federal Convention of 1787* (Max Farrand ed. 1911) 10, 11

TABLE OF AUTHORITIES—Continued

Page

Notes of Robert Yates (June 23, 1787), *in* 1 *The Records of the Federal Convention of 1787* (Max Farrand ed. 1911) 9

Notice of Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530 (Feb. 6, 2013) 31

Paul M. Sniderman et al., *Stability of Support for the Political System*, 3 Am. Pol. Q. 437 (1975) 20

President Grant's Friends, Independent (New York), Aug. 22, 1872 ..... 14, 15

Richard Briffault, *Life of the Parties? Money, Politics, and Campaign Finance Reform*, 8 Election L.J. 207 (2009) 16

Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077 (2004) 5

Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. Kan. L. Rev. 1 (2003) ... 10, 11

Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971) 13

TABLE OF AUTHORITIES—Continued

Page

Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103 (2002) 15, 16

Roger G. Dunham & Armand L. Mauss, *Waves from Watergate: Evidence Concerning the Impact of the Watergate Scandal upon Political Legitimacy and Social Control*, 19 Pac. Soc. Rev. 469 (1976) 20

S. Rep. No. 59-3056 (1906) 18

S. Rep. No. 92-229 (1971) 21

S. Rep. No. 93-310 (1973) 22

Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005) 12, 13

Susan J. Pharr, Robert D. Putnam & Russell J. Dalton, *A Quarter-Century of Declining Confidence*, 11 J. Democracy 5 (2000) 20

The Federalist No. 10 (James Madison) (Tudor Publishing Co., 1937) 6

The Federalist No. 22 (Alexander Hamilton) (Tudor Publishing Co., 1937) 4

The Federalist No. 39 (James Madison) (Tudor Publishing Co., 1937) 6, 7

TABLE OF AUTHORITIES—Continued

Page

The Federalist No. 46 (James Madison) (Tudor Publishing Co., 1937) 5, 10

The Federalist No. 51 (Alexander Hamilton or James Madison) (Tudor Publishing Co., 1937) 11

The Federalist No. 52 (James Madison) (Tudor Publishing Co., 1937) 7

The Federalist No. 57 (James Madison) (Tudor Publishing Co., 1937) 9, 10

Theodore Roosevelt, President of the U.S., State of the Union Address (Dec. 3, 1907) 17, 18

Theodore Roosevelt, *Theodore Roosevelt: An Autobiography* (1913) 18

Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009) 9, 10

INTEREST OF THE *AMICUS CURIAE*[1]

The Brennan Center for Justice at N.Y.U. School of Law is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full political participation, and to ensure that public policy and institutions reflect diverse voices and interests that make for a rich and energetic democracy.

SUMMARY OF ARGUMENT

On Inauguration Day when each new President of the United States takes office, those watching on television across the United States and throughout the world are reminded that on that day our country is undertaking a peaceful transition of power from one leader to the next and often one political party to another. Regardless of how vehemently the election campaign had been waged, there is no argument from the outgoing president, who until leaving office is seen as the most powerful public figure in the world. There is instead acceptance that the people have chosen a new leader by operation of a democratic process designed over two hundred years ago. While many have come to

---

[1] This *amicus curiae* brief is filed with the written consent of the parties. Pursuant to Supreme Court Rule 37, *amicus curiae* states that counsel for *amicus* authored this brief in its entirety. No person or entity other than *amicus*, its supporting organizations, and its counsel made a monetary contribution to the preparation of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

take such peaceful transitions in the United States for granted, they are, in fact, remarkable in the context of history and in comparison to many other nations of the world.

Such transitions are possible because the Founders of our Republic carefully crafted a form of government designed to ensure that sovereignty would rest with the "People" as a whole, and that the People would have continuing faith in our representative form of government as a government "of the People." Fearing that government could be corrupted if influence-seeking were unchecked and narrow classes gained disproportionate influence, the Founders structured our republic to ensure that the People were the "pure, original fountain of all authority." They sought to ensure that the People were steadfastly confident in the integrity of the government.

Maintaining the People's sovereignty and their faith in the government are compelling interests of the highest order. The Founders understood that if these interests are not properly safeguarded, the government can become subject to control by factions working for their own peculiar interests rather than the interests of the broader public.

History reinforces the importance of the faith of the People in government and our collective abhorrence for any particular faction or group becoming sovereign. When in our history the People have seen such control or influence by a faction developing, strong steps have been taken to ensure that sovereignty remains with the People.

One of the most important steps to beat back government by faction has been the adoption of campaign contribution limits, of which aggregate contribution limits are an essential component. In the absence of aggregate contribution limits, donors of substantial means could give effectively unlimited sums directly to candidates and parties, marginalizing the role of the People as a whole and ensuring the dominance of powerful factions after elections conclude. That would invite the very consequence that our nation has long sought to avoid: undue influence of the few with a resulting loss by the People of their faith in our system of representative government.

We submit this brief to emphasize the singular importance of maintaining the integrity of the democratic process and the faith of the People in their government, as designed by the Founders, and the importance of weighing the constitutionality of campaign contribution limits with due emphasis on those compelling government interests.

ARGUMENT

I. From the Founding of Our Government Through to the Present Day, Efforts To Protect the Integrity of the Democratic System of Government Have Been Considered To Be Imperative.

A. The Founders were concerned with the integrity of the new form of government and the People's confidence in that government.

From the nation's inception, the Founders sought to ensure the integrity of the new system of representative government and the People's confidence in it. Doing so, they understood, required that sovereignty be genuinely held—and be understood by the citizenry to be held—by the People as a whole.

As Alexander Hamilton proclaimed in the Federalist Papers, the legitimacy of a democratic government depends on the People's confidence and consent: "The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority." *The Federalist No. 22*, at 151 (Alexander Hamilton) (Tudor Publishing Co. 1937); *see also* John Locke, *Two Treatises of Government* 355 (1821); Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 9-16 (1948). James Madison reiterated this principle: "[T]he ultimate authority, wherever the derivative

may be found, resides in the people alone . . . ." *The Federalist No. 46*, at 321 (James Madison) (Tudor Publishing Co. 1937). And James Wilson warned at the Constitutional Convention that without the support of the people, a republican government will fail: "No government could long subsist without the confidence of the People. In a republican Government this confidence was particularly essential." *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* 40 (Bicentennial ed. 1987) [hereinafter *Debates*]. *See also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000) ("Democracy works only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." (citing *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961)) (internal quotation marks omitted)).

The Founders conceived of public office as a trust,[2] with politicians as fiduciaries who must be loyal to the whole people, not just to a particular

---

[2] The language of trusteeship permeates the founding documents, state constitutions, and writings from the time. It is found in the Federalist Papers and in debates over the sedition act. For example, The Federalist No. 46 states: "[G]overnments are in fact . . . agents and trustees of the people . . . ." *The Federalist No. 46*, *supra*, at 321. The language of trusteeship and fiduciary responsibility "seems to rank just below 'liberty' and 'republicanism' as an element of the ideology of the day." *See* Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buff. L. Rev. 1077, 1086 (2004).

group. Accordingly, the Founders were especially concerned about the growth of small and powerful factions—defined, in Madison's words, as groups of citizens "united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community." *The Federalist No. 10*, at 63 (James Madison) (Tudor Publishing Co. 1937). They believed that such factions were not unlike the King and the aristocracy from whom they had separated, and were concerned that factions wielding undue influence would corrupt the government and undermine the People's confidence in it.

In the Federalist Papers, Madison voiced his worry about the impact that effective representation of factions rather than the whole people would have on the new Republican form of government:

> [W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people . . . . It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for

> their government the honorable title of republic.

The Federalist No. 39, at 257 (James Madison) (Tudor Publishing Co. 1937).

The Founders worried that if such factions became too powerful, public officials would become beholden to them and would use, or be perceived as using, their power as representatives of the people to benefit only narrow coalitions. Driven by that concern, the Founders designed a government that would not likely fall prey to such factions. *See* Lawrence Lessig, *Republic Lost* 130 (2011) (quoting *The Federalist No. 52* (James Madison) ("This is the work of sophisticated constitutional architects all aimed at a single end: to establish and protect a link between Congress and 'the People alone.'")). The Constitution that they wrote distributed power between state and federal governments, put in place checks and balances between the three federal branches, and designed elections so as to maintain a government free from control by a few.

While debating the method of electing senators at the Constitutional Convention of 1787, as reported by James Madison, Gouverneur Morris of Pennsylvania urged that even a strong, independent government was not enough. The new Republic also needed shrewd, carefully selected politicians, as well as governmental institutions designed to watch those elected closely: "A firm [government] alone can protect our liberties. [Morris] fears the influence of the rich. They will have the same effect here as

elsewhere if we do not by such a [government] keep them within their proper sphere." *Debates*, *supra*, at 235.

To this end, beyond structuring the government to divide powers among the branches, the Founders placed additional safeguards in the Constitution to prevent government from developing illegitimate dependencies. The Ineligibility Clause,[3] the Origination Clause,[4] and the Emoluments Clause[5] were all created to preserve the government's dependency upon the People. Lessig, *supra*, at 129-30. Similarly, the delegates decided that the federal government should pay for the salaries of members of Congress in order to prevent them from being dependent upon state legislatures rather than the People.[6] Edmund Randolph warned, "If the States were to pay the members of the Natl. Legislature, a dependence would be created that would vitiate the whole System." *Debates*, *supra*, at 171. Hamilton echoed this concern, saying, "Those who pay are the masters of those who are paid." *Id.* at 133.

The founding generation cited the need to avoid the corrupt capture of government by faction early and often in the convention and ratification

---

[3] U.S. Const. art. I, § 6, cl. 2.

[4] *Id.* art. I, § 7, cl. 1.

[5] *Id.* art. I, § 6, cl. 2.

[6] *See id.* art. I, § 6, cl. 1.

debates. In one of the first speeches made at the Constitutional Convention, George Mason warned, "[I]f we do not provide against corruption, our government will soon be at an end . . . ." Notes of Robert Yates (June 23, 1787), *in* 1 *The Records of the Federal Convention of 1787*, at 391, 392 (Max Farrand ed. 1911). In his Notes, Madison noted that fifteen delegates used the term "corruption" no fewer than a combined fifty-four times. *See* James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. Pol. 174, 177 (1994). Indeed, at the Convention, "there was near unanimous agreement that corruption was to be avoided, that its presence in the political system produced a degenerative effect." *Id.* at 181.[7] The topic was again discussed extensively in the public debates over the Constitution's ratification. *See* Bernard Bailyn, *The Ideological Origins of the American Revolution*, at xiii (enlarged ed. 1992). As Professor Zephyr Teachout succinctly notes, "The Framers were obsessed with corruption." Zephyr Teachout, *The*

---

[7] Madison expressed a similar concern in The Federalist No. 57:

> The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.

The Federalist No. 57, at 389 (James Madison) (Tudor Publishing Co. 1937).

Anti-Corruption Principle, 94 Cornell L. Rev. 341, 348 (2009).

The historical record leaves no doubt that the Founders understood corruption as more than just individual *quid pro quo* payments for legislation. To them corruption encompassed any use of public power for private purposes—not merely theft, but any use of government power and assets to benefit special interests rather than the broader public. *See* Robert Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. Kan. L. Rev. 1, 48 (2003). They believed it critical that legislators remain "impartial guardians of a common interest," *The Federalist No. 46*, at 324 (James Madison) (Tudor Publishing Co. 1937), and be "scrupulously impartial to the rights and pretensions of every class and description of citizens." *The Federalist No. 57*, at 389-90 (James Madison) (Tudor Publishing Co. 1937). They discussed the need for impartiality repeatedly when drafting the Constitution.[8] And

---

[8] *See* Notes of James Madison, in 1 *The Records of the Federal Convention of 1787*, at 88 (Max Farrand ed. (1911)) (reporting Pierce Butler's statement that unity in executive will promote impartiality); *id.* at 139 (recording Elbridge Gerry as making same point); *id.* at 427-28 (noting James Madison's belief that Senate would promote impartiality); *id.* at 580 (recording John Randolph's statement on importance of impartial census); Notes of James Madison, 2 *The Records of the Federal Convention of 1787*, at 42 (Max Farrand ed. (1911)) (reporting statement of Gouverneur Morris on importance of impartial impeachment trial); *id.* at 124 (noting James Madison's belief in need for impartiality in representation); *id.* at 288 (noting Oliver Elsworth's statement on desirability of

they structured the new government to ensure that it could not be bent to the will of any circumscribed class of citizens, declaring that the People would recognize the government as a failure if such a result came to pass. *See The Federalist No. 51*, at 358 (Alexander Hamilton or James Madison) (Tudor Publishing Co. 1937) (discussing need for checks and balances to create government immune to control by factions).

B. The First Amendment reflects the Founders' concern for the integrity of the new system of democratic self-government and the People's confidence in that government.

Just as checks and balances were intended to prevent the rise of a new controlling aristocracy, the First Amendment was designed to safeguard a full and robust debate among all citizens in order to preserve the People's role in the electoral and legislative processes. As this Court has repeatedly recognized, such robust "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

The First Amendment seeks to preserve a genuine public debate, not a debate where only powerful factions are able to meaningfully

---

impartial rewards for merit). *See generally*, Natelson, *The General Welfare Clause and the Public Trust*, *supra*, at 51-53.

communicate. The amendment is intended to ensure that no faction exerts undue influence upon the subjects and parameters of the debate by overwhelming the voices of others in the debate as to both possible issues and candidates for political office. It would be the very antithesis of what the First Amendment freedoms are intended to preserve to allow factions, using their wealth, to monopolize debate, and thereby monopolize governance.

This concern is not that the "playing field" be made "level" for all, *see Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), or that all citizens be given an equal voice. Rather, the concern is that all citizens be afforded a chance to participate meaningfully in the public debate and that their voices not be drowned out. The aggregate contribution limits at issue in this case afford a chance for citizens who give only modest sums to have their voices heard in the public debate and thereby guide governmental policy. That is the very essence of representational government and, as the Founders recognized, it is crucial if the People are to have faith in their government.

Scholars have often recognized that one of the fundamental aims of the First Amendment is to protect and preserve the People's interest in self-government and governmental processes. *See* Meiklejohn, *supra*, at 26 ("The principle of the freedom of speech springs from the necessities of the program of self-government."); *see also* Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 46-47 (2005) (explaining how First

Amendment protects participatory self-government); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 24-28 (1971); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 Sup. Ct. Rev. 245, 255.

It has been recognized accordingly from the time of the Founders and throughout the country's history that self-government—and the public's confidence in government—are threatened by the ability of a faction of wealthy individuals to monopolize political debate by contributing immense amounts of money to political parties and candidates for political office. *See infra* Parts I.C, II.B. Wholly consistent with that, limits on contributions to candidates for political office have been adopted to thwart control by faction and the resulting erosion of the public's confidence in self-government. Such limits are thus entirely consistent with the imperative of self-government that animates the First Amendment. *See* Breyer, *supra*, at 47-48 ("To focus upon the First Amendment's relation to the Constitution's democratic objective is helpful because the campaign laws seek to further a similar objective. . . . Ultimately, they seek thereby to maintain the integrity of the political process . . . . Insofar as they achieve these objectives, those laws, despite the limits they impose, will help to further the kind of open public political discussion that the First Amendment seeks to sustain, both as an end and as a means of achieving a workable democracy.").

C. When factions have threatened the People's faith in democracy, the Congress has acted to reform campaign finance practices.

History provides numerous examples of the danger of political capture by factions threatening democratic governance and the People's faith therein. Such episodes have regularly been followed by steps to reinforce the People's faith in their representative government through legislation and reform.

i) The excesses of the Gilded Age and resulting reforms of the Progressive Era

It was widely known that the 1872 presidential campaign of Ulysses S. Grant was financed in large part by a few exceedingly wealthy individuals. In fact, financier and railroad tycoon Jay Cooke single-handedly funded twenty-five percent of the Republican campaign budget. *See* Katherine Bacher, Univ. of Pittsburgh Sch. of Law, *U.S. Campaign Finance*, Jurist, http://jurist.org/feature/2013/07/us-campaign-finance.php (last visited July 19, 2013).

Such contributions became a singular concern of the American people, who considered Grant entirely beholden to his wealthy backers. As one contemporaneous editorial explained, a common assertion was that "President Grant's friends are all in office or all in 'rings.' . . . All are gorged with

plunder or plethoric with power." *See President Grant's Friends*, Independent (New York), Aug. 22, 1872, at 4. Grant's notoriety made him the subject of a poem published in The Prairie Farmer, which called him the "Present-Taking President" and noted, "a liberal giver never lacks [a] welcome at [his] gate." *See Mescellany—Campaign Poetry: The Present-Taking President*, 43 Prairie Farmer 267 (Chicago 1872). The public believed that Grant was indebted to the wealthy and that his government was illicitly filled with his financiers rather than individuals chosen in the best interests of the People.

Concerns about election funding—and the capture of government by wealthy political benefactors—continued throughout the nineteenth century's Gilded Age. *See* Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1131 (2002). The 1896 election of William McKinley was particularly notorious as the "high-water mark" for corporate funding of political campaigns. Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L.J. 871, 883 (2004).

Mark Hanna, McKinley's campaign manager, famously said, "There are two things that are important in politics. The first is money, and I can't remember what the second is." Melvin I. Urofsky, *Money and Free Speech: Campaign Finance Reform and the Courts* 3 (2005). Consistent with that approach to government—which was exactly what the Founders feared—Hanna's extensive fundraising

efforts brought McKinley to the White House. Hanna solicited contributions from corporate leaders, irrespective of their party affiliation, while informing them of the contributions their peers and competitors had already made. Sitkoff, *supra*, at 1133. In doing so, he essentially "taxed" large corporations and financiers for contributions to support his candidates. *See id.* at 1132.

Tapping into such reservoirs of great wealth allowed the Republican Party to "open[] up a tremendous money advantage over the Democrats." Richard Briffault, *Life of the Parties? Money, Politics, and Campaign Finance Reform*, 8 Election L.J. 207, 211 (2009). Hanna raised "as much as $7 million," Bradley A. Smith, *The Sirens' Song: Campaign Finance Regulation and the First Amendment*, 6 J.L. & Pol'y 1, 10 (1997), an extraordinary sum equivalent, as a percentage of gross domestic product, to about $3 billion in today's dollars. *See also* Jackson Lears, *Rebirth of a Nation: The Making of Modern America, 1877-1920*, at 188 (2009). One historian estimates that the McKinley campaign outspent William Jennings Bryan by ten-to-one. Winkler, *supra*, at 884.

So important was Hanna's fundraising to the McKinley campaign that critics saw "[t]he candidate [as] swallowed by the manager." Alfred Henry Lewis, *Mark Hanna, M'Kinley, and the Labor Unions*, News & Observer (Raleigh, N.C.), Aug. 9, 1896, at 2. McKinley's subsequent narrow victory spurred calls for campaign finance reform that were central to the platform espoused by Progressive Era

reformers. Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. Rev. L. & Soc. Change 602, 648 (2011).

Prominently, at the beginning of the twentieth century, President Theodore Roosevelt recognized the need for campaign finance reform and called for legislation to ban corporate contributions for political purposes. He advocated the establishment of meaningful contribution limits and the public financing of campaigns, expressing embarrassment over the corporate financing of his own campaign for the Presidency. *See* Kate Pickert, *Campaign Financing: A Brief History*, Time (June 30, 2008), http://www.time.com/time/nation/article/0,8599,1819288,00.html (noting Roosevelt was accused of "promis[ing] a French ambassadorship to a senator from New York in exchange for $200,000 in big business campaign donations"). In his 1907 State of the Union address, President Roosevelt proclaimed:

> The need for collecting large campaign funds would vanish if Congress provided an appropriation for the proper and legitimate expenses of each of the great national parties, an appropriation ample enough to meet the necessity for thorough organization and machinery, which requires a large expenditure of money. Then the stipulation should be made that no party receiving campaign funds from the Treasury should accept more than a fixed amount from any individual subscriber or donor; and the

> necessary publicity for receipts and expenditures could without difficulty be provided.

Theodore Roosevelt, President of the U.S., State of the Union Address (Dec. 3, 1907).

Roosevelt's call for meaningful contribution limits followed from his belief that large contributions necessarily corrupted government and undermined public faith in the government's integrity. He called such contributions "sins which [America] treats as most abhorrent," going on to say that "we are peculiarly sensitive about big money contributions for which the donors expect any reward." *See* Theodore Roosevelt, *Theodore Roosevelt: An Autobiography* (1913).

Roosevelt's encouragement led to passage of the Tillman Act of 1907. The Senate's report on the legislation emphasized that the pitfalls of the use of money in the political process "are so generally recognized that the committee deem it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials." S. Rep. No. 59-3056, at 2 (1906). The Tillman Act's prohibition on corporate campaign contributions was an effort to not only protect the integrity of the electoral process, but also to preserve its reputation in the eyes of the people.

For the same reasons, like legislation passed in the following decades. The Federal Corrupt

Practices Act established campaign contribution limits for House general elections, Publicity of Political Contributions Act, Pub. L. No. 61-274, 36 Stat. 822 (1910); was amended in 1911 to extend to Senate and primary elections, Pub. L. No. 62-32, 37 Stat. 25 (1911); and in 1925 was extended to multi-state parties and election committees, Pub. L. No. 506, Title III, 43 Stat. 1070 (1925). It was followed by the Hatch Act of 1939, which prevented the leveraging of federal resources for partisan political gain by prohibiting civil servants from campaigning for elected office, Pub. L. No. 76-252, 53 Stat. 1147, as well as the Taft-Hartley Act in 1947, which prohibited unions and corporations from making independent campaign expenditures, Labor Relations Management Act, 1947 ("Taft-Hartley Act"), Pub. L. No. 80-101, 61 Stat. 136. Each of these statutes sought to prevent the undue influence of large donors and special interests on candidates and elected officials, lest such factions control government.

ii) Campaign finance abuses in the Watergate Era and the post-Watergate reforms

Over the course of President Nixon's first term and into his 1972 reelection campaign, extensive campaign finance abuses again rocked Americans' faith in the political system. Months of investigation in connection with the Watergate scandal revealed a series of exchanges of government favors for outsized campaign contributions: a $300,000 contribution for a nomination to the Luxembourg Ambassadorship, a $400,000 pledge to

the 1972 Republican convention by ITT in exchange for settling several antitrust matters on favorable terms, and a $2 million contribution pledge for $100 million in price supports for milk.[9] These revelations and the others that led to President Nixon's resignation "disastrously undermined public respect and confidence in government leaders, . . . and . . . demoralized and disillusioned the youth, in particular, whose commitment to 'the system' . . . [was] pushed to an all-time low." Roger G. Dunham & Armand L. Mauss, *Waves from Watergate: Evidence Concerning the Impact of the Watergate Scandal upon Political Legitimacy and Social Control*, 19 Pac. Soc. Rev. 469, 469-70 (1976).

The impact of this disillusionment was both exceptional and lasting. "In 1964, only 29 percent of the American electorate agreed that 'the government is pretty much run by a few big interests looking out for themselves.' By 1984, that figure had risen to 55 percent." Susan J. Pharr, Robert D. Putnam & Russell J. Dalton, *A Quarter-Century of Declining Confidence*, 11 J. Democracy 5, 10 (2000). The electorate's cynicism was directed not only at the President but politicians generally, as well as to their parties and the electoral process. *See* Paul M. Sniderman et al., *Stability of Support for the Political System*, 3 Am. Pol. Q. 437, 455 (1975).

---

[9] Ciara Torres-Spelliscy, *How Much Is An Ambassadorship? And the Tale of How Watergate Led to a Strong Foreign Corrupt Practices Act and a Weak Federal Election Campaign Act*, 16 Chap. L. Rev. 71, 82, 87-89, 92 (2012).

The Federal Election Campaign Act of 1971 ("FECA") was designed to increase public confidence in government and prevent corruption by increasing disclosure of federal campaign contributions. Legislative reports from both houses of Congress discussed the corruptive influence of untrammeled campaign spending on the political process, acknowledging that the appearance of corruption is as harmful to democratic governance as actual corruption, because the People's trust is necessary for democracy to function. *See, e.g.*, S. Rep. No. 92-229, at 1851-52 (1971) (supplemental views of Messrs. Prouty, Cooper & Scott) ("Democracy succeeds only where citizens have faith and trust in their Government and its elected officials. . . . [This legislation] can be the most effective method for restoring to the public the confidence necessary for democracy to work."). By making the political process more transparent and campaign contributions less clandestine, Congress sought to protect that necessary confidence.

But, in the wake of the Watergate scandal, Congress determined that increased transparency was not sufficient; more fulsome disclosure requirements without effective contribution limits would not adequately check the influence of money in elections and government. Congress therefore returned to FECA, and in 1974, amended the Act to include such limits. The legislative history shows that the contribution limits were again intended to address concern for the integrity of the election process and the public's perception of the influence of

money on elections and elected officials. As emphasized in one hearing, "It is crucial that we make our regulation of contributions and expenditures effective so that our citizens do not receive, or believe they have been duped by, a billion dollar fraud." Federal Election Reform, 1973: *Hearings Before the Subcomm. on Privileges & Elections of the Committee on Rules & Admin.*, 93d Cong. 15 (1973) (statement of Sen. Mathias).

The House reported, "Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign." H.R. Rep. No. 93-1239, at 3 (1974). "Contribution limitations should restore public confidence by eliminating or reducing public suspicion that candidates are being 'bought' or influenced by large campaign contributions." *Id.* at 115 (minority views). The Senate agreed, stating that "[s]urely, in the interest of protecting the integrity of the elective process, there is a right to exercise reasonable control over the amount of money which may be poured into an election campaign." S. Rep. No. 93-310, at 6 (1973). The legislature put its emphasis on protecting the faith of the People in the democratic process, and believed that limiting the size of contributions to candidates and political committees was the way to achieve that goal.

The legislators also recognized that contribution limits would encourage greater political activity by individuals who would otherwise be discouraged from participating by the perception

that large donors had overwhelming influence on the elective process. As Representative Gaydos stressed, such apathy "is a problem that concerns all of us. The setting of very low limits on individual contributions should serve to convince these individuals that they should take a more active part in election campaigns." 120 Cong. Rec. 27228 (1974) (statement of Rep. Gaydos).

A generation later, Congress amended FECA once more via the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Through BCRA, Congress placed limits on the contributions that could be made by interest groups to national political parties with the goal of restoring the public's confidence in America's representative democracy. As the Committee on House Administration reported:

> It is our concern that the presumption of fairness has been seriously eroded . . . by the large sums of money raised and spent in today's elections. And it is futile to try to sort out how much of this erosion is justified by reality and how much of it is simply a perception; both pose serious problems for our democracy. For as the sense of legitimacy of our elections is eroded, so too is the fundamental legitimacy of government itself. . . . People believe . . . that campaign contributions seem to determine political outcomes more than voting. No accusation cuts deeper because when money and privilege

> replace votes, the social contract underlying the political system is abrogated. Influenced by this widespread perception, people decide that voting doesn't really count anymore — so why bother?

H.R. Rep. No. 103-375, at 29 (1993) (citation omitted). In passing BCRA, Congress determined that the appearance of capture by wealthy factions was just as troublesome as actual capture, since the belief that the political process is controlled by those with outsized wealth delegitimizes democracy and discourages participation.

Representative Shays agreed with the Committee: "[T]his legislation aims to restore public faith in our democracy. . . . We have a historic opportunity here not only to end the appearance of corruption, but to reinvigorate our democracy by making individual citizens' votes count, and by encouraging the most qualified candidates to run for election." 148 Cong. Rec. 1306 (2002) (statement of Rep. Shays). Senators and Representatives alike joined in this sentiment, stating, "The appearance of corruption is rampant in our system, and it touches virtually every issue that comes before us," 147 Cong. Rec. 3865 (2001) (statement of Sen. Feingold); "Our representative democracy is harmed by eroding participation," 147 Cong. Rec. 5198 (2001) (statement of Sen. Kohl); "It is not unreasonable that the public perception of even the appearance of corruption erodes public confidence in the integrity of our electoral process and the independence of our

democracy," 148 Cong. Rec. 3559 (2002) (statement of Sen. Dodd); and "Our election laws were designed to protect the public's confidence in our democratically elected officials," 148 Cong. Rec. 3575 (2002) (statement of Rep. Levin).

The concerns that motivated Congress in establishing limits on contributions were thus exactly the same concerns that the Founders had with respect to factions. Congress acted to preserve the integrity of government and the People's faith in it—just as the Founders had.

II. Preventing Corruption and the Appearance of Corruption Are Aspects of a More Fundamental Governmental Interest in Preserving the Integrity of Self-Government.

A. This Court has long recognized these interests as being the basis on which contribution limits are upheld.

Consistent with the history described above, this Court has repeatedly identified the prevention of government corruption and the appearance of such corruption—as those terms were understood by the Founders—as compelling interests which Congress can further through campaign contribution limits. *See Citizens United v. FEC*, 558 U.S. 310, 345 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007); *Randall v. Sorrell*, 548 U.S. 230, 248 (2006); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388 (2000). In *Buckley v. Valeo*, 424 U.S. 1, 26 (1976),

the Court found it "unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation" and associated aggregate limits.

The interest of the legislature in preventing actual corruption of government is evident and has consistently been identified as compelling by this Court. In the Court's words, the "importance of the governmental interest in preventing [corruption of elected representatives through the creation of political debts] has never been doubted." *See FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982) (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)).

Like the Founders, this Court has recognized that the importance of combating the appearance of corruption has traditionally not been limited merely to addressing the perception that some individual members of government may be corrupt. Rather, the appearance of corruption encompasses public perceptions of systemic compromises to the integrity of government through government by factions. Such concerns are driven by the fundamental interest in preserving necessary public confidence in the democratic concept that members of government actually represent the People as a whole.

As emphasized by this Court in *FEC v. National Right to Work Committee*, "These interests directly implicate the integrity of our electoral

process, and, not less, the responsibility of the individual citizen for the successful functioning of that process." 459 U.S. 197, 208 (1982) (internal quotation marks omitted). Public confidence in the system of government is the ultimate interest on which a government can legislate because it is firmly based in constitutional bedrock, and because public engagement in self-government is impossible without it. The legitimacy of the government legislating to protect public confidence in the system of government was recognized by this Court in *Ex parte Yarbrough*, 110 U.S. 651, 658 (1884), when it stated that "[i]f it has not this power it is left helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption."[10]

---

[10] As discussed more fully above, *see supra* Part I, the origin of this fundamental interest can be traced back to the Declaration of Independence and the struggle of colonial America in freeing itself from the rule of a King and the aristocratic class in England. The republican form of government as provided for by the Constitution and the rights enshrined by the First Amendment were the means by which the Founders sought to ensure government by the People, free from a governing elite. The same concern for government by the People animated campaign finance reform in the years after the Civil War era, when rapid industrial expansion led to the concentration of wealth in the hands of a few. As observed by the Supreme Court, "[n]o less lively [an issue than abusive monopolies], although slower to evoke federal action, was popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption." *United States v. Automobile Workers*, 352 U.S. 567, 570 (1957). "[T]he power of wealth threatened to undermine the political integrity of the Republic." *Id.* (quoting 2 Samuel Eliot Morison & Henry Steele Commager, *The Growth of the American Republic* 355 (4th ed. 1950)).

The concern now, as in all periods of our nation's history, is that citizens who do not believe that their government represents them, or that it is not responsive to their needs, have no interest in remaining bound to that polity's rules and values. As this Court also said in *Ex parte Yarbrough*:

> In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence and by corruption is a constant source of danger.
>
> Such has been the history of all republics, and, though ours has been comparatively free from both these evils in the past, no lover of his country can shut his eyes to the fear of future danger from both sources. . . .
>
> If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal

---

This concern about concentration of power goes to the heart of the American experiment—preventing rule by a King or a factional elite and ensuring the government appears legitimate.

> restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.

110 U.S. at 666-67.

B. Concerns about the perception of corruption are well founded.

Recent polls show that voters again today generally assume a high degree of corruption in government and feel negatively toward money in politics.

In a 2011 CNN Opinion Research Poll, two-thirds of respondents agreed that "elections are usually for sale to the candidate who can raise the most money," and eighty-six percent thought that "elected officials in the nation's capital are mostly influenced by the pressure they receive from campaign contributors." CNN Opinion Research Corporation, *Poll: June 3-7, 2012*, CNN.com 2 (June 9, 2011), http://i2.cdn.turner.com/cnn/2011/images/06/09/rel10d-2.pdf. A 2009 Rasmussen Poll found that fifty-seven percent of American adults believed political donors "get more than their money back in terms of favors from members of Congress." *Most Say Political Donors Get More than Their Money's Worth*, Rasmussen Reports (Feb. 9, 2009), http://www.rasmussenreports.com/public_content/

politics/general_politics/february_2009/most_say_political_donors_get_more_than_their_money_s_worth.

Likewise, sixty-six percent of those polled in a 2013 Huffington Post poll believed that money spent on election advertising by independent groups, corporations and unions causes political corruption. Only fifteen percent of those polled believed that such money does not cause political corruption. *See* Huffington Post & YouGov, *Omnibus Poll*, Huffington Post (Feb. 2013), http://big.assets.huffingtonpost.com/cftoplines_split1.pdf; *see also* Emily Swanson, *Campaign Finance Poll Finds Most Support Donation Limits*, Huffington Post (Feb. 22, 2013), http://www.huffingtonpost.com/2013/02/22/campaign-finance-poll_n_2743877.html.

One cannot overstate the strength of the connection between the public perception of the corrupting influence of large campaign donations and the public's faith that our republican democracy serves the will of the People.

III. The Results of Striking Aggregate Contribution Limits Must Be Assessed Against This Background.

A. Eliminating aggregate limits would render the underlying contribution limits virtually meaningless.

As the lower court properly held, striking the aggregate contribution limits at issue on this appeal would facilitate easy circumvention of the underlying

contribution limits that have long stood as a bulwark against government corruption and perceptions of corruption, rendering the underlying limits a dead letter.

Without the aggregate limits, a wealthy donor in the 2013-14 election cycle could give $2,433,600 to all federal candidates of one party; $194,400 to the federal party; and $1,000,000 to the party's state committees. *See* Notice of Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013). In all, a single donor could give $3,628,000 to benefit one party over the course of one election cycle—an amount more than 70 times the median annual family income of just over $51,000.

Similarly, were the aggregate limits eliminated, a donor hedging his or her bets by supporting both major parties could legally donate over $7.25 million in one federal election cycle—thus ensuring undue influence and access to elected officials regardless of which party prevailed. This is not a fanciful possibility; the Court has noted the prevalence of such bet-hedging, observing a decade ago that "more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties, leaving room for no other conclusion but that these donors were seeking influence, or avoiding retaliation, rather than promoting any particular ideology." *McConnell v. FEC*, 540 U.S. 93, 148 (2003); *see also id.* at 147 ("[L]obbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national

committees not on ideological grounds, but for the express purpose of securing influence over federal officials.").

The likelihood of donors making six- and seven-figure donations would be compounded by the ability—and practical need—of federal candidates and officeholders to legally solicit such massive contributions. While federal law prohibits officeholders and candidates from soliciting "soft money" funds not subject to the federal "hard money" limits, *see* 2 U.S.C. § 441i(e), in the absence of aggregate limits, these solicitation restrictions would effectively be eliminated through the use of joint fundraising committees and internal party transfers.

Joint fundraising committees are commonly used vehicles that allow candidates and other political committees to fundraise together; they allow donors to write the joint fundraising committee a single check equaling the "total amount that the contributor could contribute to all of the participants under the applicable limits" for all participating committees. 11 C.F.R. § 102.17(c)(5). Through the use of a joint fundraising committee, a single candidate could solicit multi-million dollar contributions, which donors could make with the stroke of a pen across a single check. As a formal legal matter, these funds would be allocated among the individual committees that effectively make up the joint fundraising committee. But because federal law permits unrestricted transfers between joint fundraising committee participants, *see* 2 U.S.C. § 441a(a)(4); 11 C.F.R. § 110.3(c), and because electronic banking allows funds to be transferred and

allocated instantaneously, a single donor's seven-figure check could be immediately disaggregated and reallocated to the national party committee to be used to promote the officeholder who solicited the check.

Without aggregate limits, this system of effectively unlimited contributions would permit a tiny class of donors to wield vastly disproportionate influence over our elected representatives, encouraging the control of government by faction that has been feared and resisted since the founding of our government.

B. Were contributions to candidates and parties effectively unlimited, they would follow the pattern of contributions to super PACs.

Without aggregate limits, contributions to federal candidates and party committees would be effectively unlimited. Under such circumstances, donations to candidates and party committees would surely follow the existing pattern of unlimited contributions to super PACs, in which a tiny group of mega-donors has dramatically dominated all contribution activity.

After the Court concluded in *Citizens United* that spending by groups formally independent of candidates would not give rise to *quid pro quo* corruption, various lower court decisions permitted the creation of so-called "independent expenditure-only groups," more commonly known as "super PACs." *See, e.g., SpeechNow.org v. FEC*, 599 F.3d

686 (D.C. Cir. 2010). Super PACs are subject to no contribution limits and have collected breathtaking sums from a very small number of donors in recent years.

In 2012, just 1,578 donors who gave at least $50,000 to super PACs were responsible for more than $760 million in donations—or 89.3% of all donations to super PACs. A mere 304 donors who gave at least $500,000 were responsible for nearly $600 million in donations—or 69.5% of funds raised by super PACs. And a tiny group of only 159 contributors, each of whom gave at least $1 million, was responsible for approximately $505 million in contributions to super PACs. This tiny faction, equivalent to about 0.00005% of the U.S. population, was responsible for nearly three in every five dollars donated to super PACs, or 58.9% of all contributions to the groups. *See* Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections* 8 (2013).

Comparing this pattern of large donor domination of super PAC giving to small donor contributions to the presidential candidates is telling. Barack Obama and Mitt Romney combined to raise $313 million in small contributions of less than $200. While the precise number of these small donors cannot be ascertained because their donations are not itemized, a conservative estimate is that there were at least 3.7 million of these small donors. By contrast, it took fewer than three dozen large super PAC donors—thirty-two contributors, each giving an average amount of $9.9 million—to exceed the amount contributed by all small donors in the

presidential race. *Id.* at 9. Similarly, House candidates raised nearly half—45%—of all individual contributions in 2012 from donors who gave less than $1,000, and Senate candidates raised more than a third—36%—of all individual contributions from donors who gave less than $1,000. *See id.* at 13. By contrast, super PACs raised nearly 94% of all of their funds from fewer than 5,000 donors who gave at least $5,000. *Id.* at 8.

Without aggregate contribution limits in place, contributions to political committees and candidates would mirror the pattern of donations to super PACs. Overwhelmingly large contributions to candidates and parties from a handful of sources—solicited directly by federal candidates and officeholders—would thus become the norm.

C. Permitting a tiny class of donors making enormous contributions to dominate political giving would give rise to extraordinary corruption risks.

Huge political contributions pose grave dangers to our democratic processes. This Court explained in *Buckley* that "contribution ceilings [are] a necessary legislative concomitant [to anti-bribery laws] to deal with the reality or appearance of corruption *inherent* in a system permitting unlimited financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 28 (1976) (emphasis added). Only the combined operation of the underlying contribution limits and the aggregate limits challenged here has prevented such an inherently corrupt system of unlimited contributions flowing directly to candidates and

parties. Even accepting, *arguendo*, that there are no corruption risks associated with the vastly disproportionate role that mere dozens of donors play with respect to nominally independent super PACs, it is clear that permitting the same domination of contributions made directly to candidates and parties would entail serious corruption risks.

Allowing a tiny faction to dominate candidate and party funding to the same degree it dominates super PAC funding would inevitably lead to the control and perception of control by factions the Founders sought to avoid. The Court affirmed the threat of real or apparent corruption in such a system when it recognized the "substantial evidence . . . that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption." *McConnell*, 540 U.S. at 154. As former Senator Alan Simpson (R-Wyo.) said, "Who, after all, can seriously contend that a $100,000 donation does not alter the way [an elected official] thinks about—and quite possibly votes on—an issue?" *Id.* at 149.

Ushering in a system of virtually unlimited direct contributions to candidates and parties would certainly give rise to pervasive perceptions of corruption among citizens. Such enhanced, widespread concerns would engender apathy, cynicism, and hopelessness toward our democratic processes, driving ordinary citizens out of the process. In the absence of aggregate contribution limits, a tiny handful of kingmakers—the dozens or hundreds of political donors capable of making seven-figure political contributions—would

monopolize political fundraising and drown out the political voices of citizens of ordinary means, regardless of their political leanings, the strength of their beliefs, or the underlying soundness of their positions. Such a system would choke the robust public debate and principled government envisioned by the Founders.

IV. The Validity of Campaign Contribution Limits Should Be Determined by a Review Cognizant of the Fundamental Interests in Maintaining Both the Integrity of Government and Public Confidence in that Government.

In an unbroken line of precedent since *Buckley*, this Court has applied "closely drawn" scrutiny to contribution limits. The Court should reaffirm that closely drawn scrutiny is the appropriate standard for evaluating the constitutionality of contribution limits, and that contribution limits pass constitutional muster if they are "'closely drawn' to match a 'sufficiently important interest.'" *FEC v. Beaumont*, 539 U.S. 146, 161-62 (2003) (quoting *Buckley*, 424 U.S. at 25); *see also Randall v. Sorrell*, 548 U.S. 230, 247, 253 (2006) (applying "closely drawn" scrutiny).

In scrutinizing the aggregate contribution limits at issue under this standard, the Court should be mindful of the paramount importance of the interests at stake. In our system of government, no interest can be more compelling than maintaining sovereignty in the whole People and their faith in the integrity of government.

In the face of a challenge to aggregate contribution limits—long a bulwark against the power of factions and the erosive force of doubt and skepticism about our system of government—these compelling interests must be given their due weight. A failure to do so would have ruinous consequences for our system of government.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of Columbia should be affirmed and the challenged biennial campaign contribution limits should be upheld as constitutional.

Respectfully submitted,

DANIEL F. KOLB
Counsel of Record

JESSICA K. FOSCHI
MICHAEL E. MCGOVERN
450 Lexington Avenue
New York, NY 10017
daniel.kolb@davispolk.com
(212) 450-4000

J. ADAM SKAGGS
DAVID W. EARLEY
BRENNAN CENTER FOR
JUSTICE AT N.Y.U.
SCHOOL OF LAW
161 Avenue of the
Americas, 12th Floor
New York, New York
10013

Attorneys for Amicus Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-536

In The
Supreme Court of the United States

SHAUN MCCUTCHEON, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF THE CAMPAIGN LEGAL CENTER, AARP, ASIAN AMERICANS ADVANCING JUSTICE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, COMMON CAUSE, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, PROGRESSIVES UNITED AND PUBLIC CAMPAIGN AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

TREVOR POTTER
Counsel of Record
J. GERALD HEBERT
TARA MALLOY
PAUL S. RYAN
MEGAN MCALLEN
THE CAMPAIGN LEGAL CENTER
215 E Street, N.E.
Washington, D.C. 20002
(202) 736-2200
tpotter@campaignlegalcenter.org

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. The Real-World Consequence of Eliminating the Aggregate Contribution Limits Would Be Massive Circumvention of the Individual Contribution Limits 4

A. Absent the Aggregate Limits, a Single Donor Could Contribute Millions of Dollars to Federal Candidates and Party Committees 4

B. Invalidation of the Aggregate Limits Would Transform Political Party Committees Into "Soft Money" Vehicles for Donors Seeking to Circumvent the Base Limits 7

1. Laws Permitting Joint Fundraising and Unlimited Internal Party Transfers Would Facilitate Circumvention 7

2. The Practice of Joint Fundraising Is Not Hypothetical 11

TABLE OF CONTENTS – Continued

Page

C. Invalidation of the Aggregate Limits Would Multiply Candidate-to-Candidate Contributions and Reinvigorate the Practice of "Soft Money" Solicitations by Federal Candidates and Officeholders 16

1. In the Absence of the Aggregate Limits, Candidates Could Participate in Massive Circumvention Schemes 16

2. Invalidation of the Aggregate Limits Would Allow Candidates to Solicit Multi-Million Dollar Checks, Recreating the Corruptive Practices That Necessitated the Bipartisan Campaign Reform Act 20

II. The Governmental Interests That Were Found in *Buckley* to Support the Constitutionality of the Original $25,000 Aggregate Limit Support the Current Aggregate Limits 22

A. The Aggregate Limits Block Circumvention of the Base Contribution Limits 2

1. The $74,600 Aggregate Limit on Contributions to Party Committees and PACs 24

a. Appellants Rely Upon a Flawed History of FECA's Enactment 24

TABLE OF CONTENTS – Continued

Page

b. Appellants Mischaracterize *Buckley* in an Attempt to Characterize the Aggregate Limits as Redundant 28

2. The $48,600 Aggregate Limit on Contributions to Candidates 33

B. The Aggregate Limits Directly Serve the Governmental Interest in Preventing Quid Pro Quo Corruption and the Appearance of Corruption 36

CONCLUSION 43

APPENDIX

Description of the *Amici Curiae* ..... App. 1

TABLE OF AUTHORITIES

Page

CASES:

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

California Medical Ass'n v. FEC, 453 U.S. 182 (1981) 16, 36

Citizens United v. FEC, 558 U.S. 310 (2010) 39, 40

FEC v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431 (2001) ..... *passim*

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

RNC v. FEC, 698 F. Supp. 2d 150 (D.D.C.), *aff'd*, 130 S. Ct. 3544 (2010) (mem.) 39

STATUTES AND LEGISLATIVE MATERIAL:

Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431 *et seq.* ..... *passim*

2 U.S.C. § 434(i)(8)(B) 17

2 U.S.C. § 439a(a)(4) 9, 26

2 U.S.C. § 441a(a)(1)(A) 4, 5

2 U.S.C. § 441a(a)(1)(B) 5, 26

2 U.S.C. § 441a(a)(1)(C) 5, 10, 17, 26

2 U.S.C. § 441a(a)(1)(D) 5

2 U.S.C. § 441a(a)(3) 1, 5

2 U.S.C. § 441a(a)(3)(A) 5

2 U.S.C. § 441a(a)(3)(B) 5

2 U.S.C. § 441a(a)(4) 9, 26

TABLE OF AUTHORITIES – Continued

Page

2 U.S.C. § 441a(a)(8) 18, 25

2 U.S.C. § 441a(d) 10, 25

2 U.S.C. § 441i(a)(1) 20

2 U.S.C. § 441i(e)(1) 20

FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 ..... 24, 25, 27, 31

§ 101(a), 88 Stat. at 1263 25

§ 101(a), 88 Stat. at 1265-66 ..... 25, 27, 31

§ 101(a), 88 Stat. at 1264 ..... 25, 27

§ 101(f), 88 Stat. at 1267-68 ..... 25, 27

FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 ..... 25, 26, 27, 28, 30

Sec. 112(2), § 320(a)(1)(B)-(C), 90 Stat. at 487 ..... 26, 27

Sec. 112(2), § 320(a)(4), 90 Stat. at 487 26

Sec. 112(2), § 320(a)(5), 90 Stat. at 487-88 26

H. R. Rep. 94-1057 (1976) (Conf. Rep.), *reprinted in* 1976 U.S.C.C.A.N. 946 27

ADMINISTRATIVE REGULATIONS AND MATERIALS:

11 C.F.R. § 100.5(e)(6) 17

11 C.F.R. § 100.5(g)(5) 17

11 C.F.R. § 102.17(a)(2) 8

11 C.F.R. § 102.17(c)(5) 8

11 C.F.R. § 102.17(c)(6) 8

TABLE OF AUTHORITIES – Continued

Page

11 C.F.R. § 110.1(c)(3) 5

11 C.F.R. § 110.1(c)(5) 5

11 C.F.R. § 110.1(j) 4

11 C.F.R. § 110.3(c)(1) 9

11 C.F.R. § 110.3(c)(2) 9

11 C.F.R. § 102.12(c)(2) 17

Transfers of Funds, Collecting Agents and Joint Fundraising, Explanation and Justification, 48 Fed. Reg. 26296 (June 7, 1983) (codified as amended at 11 C.F.R. § 102.17) 11

FEC, *Contribution Limits for 2013-2014*, http://www.fec.gov/info/contriblimitschart1314.pdf 4

FEC, *Coordinated Party Expenditure Limits 2012*, http://www.fec.gov/info/charts_441ad_2012.shtml 11, 31

FEC, *FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle* (Apr. 19, 2013), http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml 6, 17

OTHER AUTHORITIES:

Paul Blumenthal, *Romney Victory Raises $140 Million, Exploits Campaign Finance Loophole*, Huffington Post, July 16, 2012, http://www.huffingtonpost.com/2012/07/16/romney-victory-fundraising_n_1675231.html 15

TABLE OF AUTHORITIES – Continued

Page

Ctr. for Responsive Pol., *Joint Fundraising Committees*, http://www.opensecrets.org/pres08/jfc.php?cycle=2008 13

Ctr. for Responsive Pol., *Joint Fundraising Committees*, http://www.opensecrets.org/pres12/jfc.php 14

Ctr. for Responsive Pol., *Leadership PACs*, http://www.opensecrets.org/pacs/industry.php?txt=Q03&cycle=2012 ..... 18, 19

Anthony Corrado, *Party Finance in the 2000 Elections: The Federal Role of Soft Money Financing*, 34 Ariz. St. L.J. 1025 (2002) 12

David M. Drucker, *Mitt Romney's Fundraising Boost Stems From Unique Tactic*, Roll Call, July 30, 2012, http://www.rollcall.com/issues/58_13/Mitt-Romneys-Fundraising-Boost-Stems-From-Unique-Tactic-216525-1.html 15

Eric S. Heberlig & Bruce A. Larson, *Congressional Parties and the Mobilization of Leadership PAC Contributions*, 16 Party Pol. 451 (2010) 19

Keena Lipsitz & Costas Panagopoulos, *Filled Coffers: Campaign Contributions and Contributors in the 2008 Elections*, 13 J. Pol. Marketing 21 (2011) 13

Michael Luo and Griff Palmer, *In Fine Print, a Proliferation of Large Donors*, N.Y. Times, Oct. 20, 2008, http://www.nytimes.com/2008/10/21/us/politics/21donate.html 13

TABLE OF AUTHORITIES – Continued

Page

Matthew Mosk, *McCain Able to Skirt Limits of Federal Financing*, Wash. Post, Sept. 17, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/09/16/AR2008091603321.html 13

Michael E. Toner, *The Impact of Federal Election Laws on the 2008 Presidential Election*, *in* The Year of Obama: How Barack Obama Won the White House 149 (Larry J. Sabato ed., 2009) 14

Kenneth P. Vogel & Abby Phillip, *Mitt Romney winning mega-donor war*, Politico, June 21, 2012, http://www.politico.com/news/stories/0612/77680.html 15

INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of nine nonprofit organizations that are concerned about the efficacy of our campaign finance laws and that work to enact, implement and defend measures to protect the integrity of government.[2]

SUMMARY OF ARGUMENT

In this case, plaintiffs-appellants McCutcheon and the Republican National Committee take aim at settled Supreme Court precedent, and request that this Court reconsider *Buckley v. Valeo*, 424 U.S. 1 (1976), in order to strike down the aggregate limits on contributions by individuals in connection to federal elections at 2 U.S.C. § 441a(a)(3).

In *Buckley*, the Supreme Court upheld the predecessor version of these aggregate limits because it prevented donors from circumventing the base limits on contributions to candidates by making "unearmarked contributions to political committees likely to contribute to [their preferred] candidate, or huge contributions to the candidate's political party." 424 U.S. at 38.

---

[1] This brief is filed with the written consent of all parties. This brief was not authored in whole or in part by counsel for any party. No person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] A description of the *amici curiae* is attached as Appendix A.

Appellants attempt to escape this precedent by arguing that Congress amended the Federal Election Campaign Act (FECA), as amended, 2 U.S.C. §§ 431 *et seq.*, following *Buckley*, and thereby resolved the circumvention problems identified in that decision and rendered the aggregate limits obsolete.

Appellants are wrong. They turn a blind eye to the real-world consequences of eliminating the aggregate limits, and disregard the ways the limits continue to advance the governmental interest in preventing corruption and the appearance of corruption, as well as in deterring circumvention of the base contribution limits.

First, as outlined in Section I of this brief, the practical effect of invalidating the challenged limits would be the evisceration of the base limits on contributions by individuals to candidates and political parties under federal law. Absent the aggregate limits, a single donor could contribute a total of more than *$2.4 million* to the candidates of his favored political party and over *$1.1 million* to the three federal committees and fifty state committees of that party in a two-year election cycle. Through the mechanism of joint fundraising, this donor could avoid the burden of making hundreds of separate contributions, and instead could write a single huge check to a joint fundraising committee formed by some or all of these entities. The proceeds of the joint fundraising effort could subsequently be funneled through the participating committees to the donor's preferred candidates. Finally, absent the aggregate limits, any

candidate could solicit a million-dollar contribution to such a joint fundraising committee, because the committee would technically receive only "hard money" contributions – even though the soliciting candidate's campaign might benefit from this largesse. In short, any serious inquiry into the probable practical effects of invalidating the aggregate limits demonstrates that those limits are vital to preserving the integrity of the contribution limits.

Second, a review of Supreme Court precedent confirms that the aggregate limits serve the governmental interest in impeding circumvention of the base limits and preventing quid pro quo corruption and its appearance. Section II of this brief demonstrates that the amendments to FECA following *Buckley* did not address, much less resolve, the circumvention concerns that the aggregate limit was devised to allay. Despite changes to federal law, the circumvention feared by the *Buckley* Court – i.e., circumvention by "unearmarked contributions to political committees likely to contribute to [a] candidate, or huge contributions to the candidate's political party" – remains possible today absent the aggregate limits. Furthermore, the aggregate limits directly prevent corruption and the appearance of corruption by blocking the recreation of the party "soft money" system that this court deemed corruptive in *McConnell v. FEC*, 540 U.S. 93 (2003). These limits should be upheld.

ARGUMENT

I. The Real-World Consequence of Eliminating the Aggregate Contribution Limits Would Be Massive Circumvention of the Individual Contribution Limits.

Appellants contend that the aggregate contribution limits are unnecessary because adherence to FECA's other contribution limits eliminates any risk of corruption. That assertion is demonstrably at odds with the foreseeable practical results of removing the aggregate limits.

A. Absent the Aggregate Limits, a Single Donor Could Contribute Millions of Dollars to Federal Candidates and Party Committees.

Under current law, the limit for contributions by an individual to a federal candidate is $2,600 per election (and thus, a total of $5,200 to a single candidate for a primary[3] and general election in a two-year election cycle). 2 U.S.C. § 441a(a)(1)(A).[4] The limit for contributions by an individual to a federal

---

[3] Every candidate is permitted to raise contributions up to the applicable primary election contribution limit, regardless of whether a primary election is held in his or her race. 11 C.F.R. § 110.1(j).

[4] The dollar limits in the statute are indexed for inflation and are consequently now higher than the amounts that appear in the statute. FEC, *Contribution Limits for 2013-2014*, http://www.fec.gov/info/contriblimitschart1314.pdf (last visited July 16, 2013).

political party committee is $32,400 per year. *Id.* § 441a(a)(1)(B). This $32,400 annual limit applies separately to each of the three federal committees of a political party – the national party committee (e.g., the RNC or DNC), the party's Senate campaign committee, and the party's House campaign committee. 11 C.F.R. § 110.1(c)(3). The limit on contributions by an individual to a state political party committee is $10,000 per year, and this limit applies separately to each of the 50 state parties. 2 U.S.C. § 441a(a)(1)(D); 11 C.F.R. § 110.1(c)(5). Lastly, individuals may give up to $5,000 per year to a multicandidate committee or any other political committee that gives to candidates ("PAC"). 2 U.S.C. § 441a(a)(1)(C).

All of these contributions subject to the federal limits ("hard money") are also subject to the umbrella aggregate limits of 2 U.S.C. § 441a(a)(3). All contributions by an individual to federal candidates are capped at an aggregate of $48,600 on a biennial basis ("$48,600 aggregate limit"), 2 U.S.C. § 441a(a)(3)(A), and all contributions by an individual to non-candidate political committees (including party committees) are capped at $74,600 biennially ("$74,600 aggregate limit"), *id.* § 441a(a)(3)(B).

These aggregate limits are crucial to making the base contribution limits effective. Without the $48,600 aggregate limit, a single donor could contribute $5,200 to every Republican or Democratic House and Senate candidate in an election cycle. In aggregate, this individual could contribute $2,433,600 to all the federal candidates of one party (given 468 federal

elections per cycle, not including run-offs or presidential candidates).

Eliminating the $74,600 aggregate limit would also enable a single donor to give similarly massive contributions to party committees. By contributing $32,400 to each of a party's three federal party committees each year, a single donor could give $194,400 to just the national party in a two-year election cycle. The same donor could give $1 million to that party's state committees by contributing $10,000 a year (or $20,000 in a two-year cycle) to each of that party's 50 state committees. By this means, a single wealthy donor could contribute $1,194,400 to one party's committees in a single election cycle. Combined with the contributions that could be made directly to that party's candidates, a single donor could provide *$3,628,000* in "limited" hard money contributions to a party and its federal candidates in a single election cycle.

Finally, the same individual could also contribute to an indeterminate – but potentially vast – number of PACs aligned with his partisan or ideological interests. In the 2012 elections, over 2,757 "non-connected" PACs (not including independent expenditure-only PACs) were active. *See* FEC, *FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle* (Apr. 19, 2013), http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml. If those committees are roughly split between the two major parties in terms of ideological orientation, donors theoretically could give $10,000 to over 1,350 PACs aligned with their

interests, or approximately $13.5 million, in a two-year election cycle. Even assuming conservatively that only 10% of these ideologically-aligned committees are "likely to contribute to [the donor's preferred] candidate[s]," as described in *Buckley*, that donor would have another outlet for over $1,350,000 in contributions in an election cycle.

It is only the aggregate limits that prevent the flow of such massive and plainly corrupting donations from donors seeking political influence to federal candidates and party leaders.

B. Invalidation of the Aggregate Limits Would Transform Political Party Committees Into "Soft Money" Vehicles for Donors Seeking to Circumvent the Base Limits.

1. Laws Permitting Joint Fundraising and Unlimited Internal Party Transfers Would Facilitate Circumvention.

It is not at all far-fetched to foresee that political parties would become vehicles for circumvention in the absence of aggregate limits: the law has mechanisms already in place that would facilitate a political party's efforts to raise, organize and spend such money, and those mechanisms are already used by parties and their candidates within the limits of current law.

Simply put, "joint fundraising" allows two or more political committees – including "political party

committees . . . candidate committees [and] multicandidate committees" – to form a committee exclusively for joint fundraising efforts. 11 C.F.R. § 102.17(a)(2). A donor may make a single check to the joint fundraising committee equaling the "total amount that the contributor could contribute to all of the participants under the applicable limits." *Id.* § 102.17(c)(5). This check is then "split" between the participating committees according to written agreement, but a participant's allocation cannot exceed its applicable contribution limit. *Id.* § 102.17(c)(6).

Using this mutually beneficial arrangement, parties and candidates can coordinate their fundraising efforts without running afoul of contribution limits. Most importantly, donors are relieved of the logistical challenge of making separate contributions to an array of different committees, and instead can simply write one check to a joint fundraising entity and receive immediate recognition for their largesse. Finally, in the case of a joint fundraising committee established between a candidate and party committees, a donor can not only contribute to the participating candidate, but also "signal" his interest in having the party committees use their allocated share of the proceeds to support this candidate.

In its simplest iteration, for example, a presidential candidate can form a joint fundraising committee with the candidate's national party and raise $37,600 in a single check, of which $5,200 can be dispersed to the candidate and $32,400 to the national party committee. Variants of this model were used by both

the Democratic and Republican presidential nominees in the 2008 and 2012 elections. *See* Section I.B.2 *infra*.

Eliminate the aggregate limits, however, and these joint fundraising committees would be able to receive single checks of astronomical amounts from individual donors. A candidate could join with the three federal party committees to form a joint fundraising committee that could receive checks of $102,400 (with $32,400 applied to the contribution limit of each party committee and $5,200 applied to the limit of the candidate's campaign committee). Nothing would prevent these participants from adding the 50 state parties to their effort. The massive joint fundraising committee that would result could receive a huge check totaling *$602,400* in a year from a single individual (with $97,200 allocated to the national party committees, $500,000 to the state party committees and $5,200 to the candidate campaign committee). And in a two-year election cycle, the total amount that could be raised would nearly double to approximately $1.2 million.

Second, federal law allows for unrestricted transfers between, *inter alia*, national and state party committees of the same party; and joint fundraising committee participants. *See* 2 U.S.C. § 441a(a)(4); 11 C.F.R. § 110.3(c)(1), (2). The law also permits candidates to transfer money to national, state and local committees of their political party without limit. 2 U.S.C. § 439a(a)(4).

In the case of a joint fundraising committee, the liberal transfer rules allow money jointly raised and subsequently allocated between the participating committees to be quickly routed back to a single committee. Thus, the joint fundraising committee discussed above, i.e., "Entire Party Joint Fundraising Committee," could take a donor's $602,000 check and allocate that money to the participating candidate committee and each of the party committees in order to attribute it to each participant's contribution limit. Then, however, all of the participating committees could each transfer their allocated amount back to a single federal party committee, such as the DNC or RNC. Because these allocations and transfers can be performed electronically and instantaneously, most of the donor's $602,000 check made out to "Entire Party Joint Fundraising Committee" could quickly end up being deposited into a single federal party committee's bank account.

Finally, the contributions aggregated in a federal party committee account could ultimately be used to benefit the candidate who had participated in the joint fundraising effort. The national party can contribute $5,000 directly to a candidate, 2 U.S.C. § 441a(a)(1)(C), and then donate significantly more in the form of coordinated expenditures. *Id.* § 441a(d). Coordinated party expenditures do not count against the party's contribution limit, but are subject to a different and higher set of limits: most recently, $21,684,200 for presidential nominees; a range from $91,200 to $2,593,100 for Senate nominees; and

$45,600 or $91,200 for House nominees. *See* FEC, *Coordinated Party Expenditure Limits 2012*, http://www.fec.gov/info/charts_441ad_2012.shtml (last visited July 12, 2013). Once the coordinated spending limit is reached, parties can make unlimited independent expenditures in support of a candidate, such as for express advocacy advertisements or GOTV in the relevant jurisdiction. Thus, by contributing to a joint fundraising committee formed by a favored candidate and multiple committees of that candidate's party, donors can signal to the participants, without triggering the earmarking rules, that their entire contribution should ultimately be used to support the participating candidate.

In short, without the aggregate limits, joint fundraising and unrestricted intra-party transfers would make the parties effective vehicles for circumvention because these techniques streamline the donation process for influence-seeking donors and enable such donors to communicate to party committees the identity of their preferred candidates.

2. The Practice of Joint Fundraising Is Not Hypothetical.

There can be no doubt that joint fundraising is legal. The FEC has permitted the use of "joint fundraising committees" in its regulations for at least 30 years. *See* Transfers of Funds, Collecting Agents and Joint Fundraising, Explanation and Justification, 48 Fed. Reg. 26296 (June 7, 1983) (codified as amended

at 11 C.F.R. § 102.17). Appellants acknowledge as much, stating that "joint-fundraising contributions are hard money, for which Congress has *already* satisfied its conduit-contribution concern." RNC Br. 47.

It is thus paradoxical that appellants also attempt to characterize joint fundraising, as described by the district court, as a "far-fetched" "hypothetical scenario." McCutcheon Br. 44-45. One can only assume they deny this reality in an attempt to undercut the lower court's finding that absent the aggregate limits, joint fundraising would offer a simple technique for donors seeking to direct "half-a-million dollars" to their candidates of choice without running afoul of the earmarking rules. *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 140 (D.D.C. 2012). But there is nothing hypothetical about joint fundraising. It is a fundraising practice that has been in regular use for over a decade, and there is no serious doubt about its existence or efficacy.

The use of joint fundraising committees first began in earnest in 2000, and was initially prevalent in Senate races.[5] During the 2000 election, 21 Senate candidates, including 14 Democrats and seven Republicans, formed joint fundraising committees with party committees.[6]

---

[5] Anthony Corrado, *Party Finance in the 2000 Elections: The Federal Role of Soft Money Financing*, 34 Ariz. St. L.J. 1025, 1040 (2002).

[6] *Id.* at 1041.

Joint fundraising committees were established by presidential candidates in the 2000 and 2004 elections, but not until 2008 did this technique became "a central component of both the candidates' and parties' fundraising strategies."[7] In 2008, then-presidential nominee Barack Obama and the DNC established a joint fundraising committee that could accept checks of over $33,000.[8] Then-presidential nominee John McCain was connected to a somewhat more complex joint fundraising effort involving the RNC, certain state Republican parties, and his campaign's compliance fund that accepted as much as $70,000 per donor.[9] In total, "the McCain campaign and Republican Party committees raised approximately $221 million through ten separate [joint fundraising committees]," while Obama and the Democratic Party

---

[7] Keena Lipsitz & Costas Panagopoulos, *Filled Coffers: Campaign Contributions and Contributors in the 2008 Elections*, 13 J. Pol. Marketing 21, 48 (2011).

[8] Michael Luo & Griff Palmer, *In Fine Print, a Proliferation of Large Donors*, N.Y. Times, Oct. 20, 2008, http://www.nytimes.com/2008/10/21/us/politics/21donate.html.

[9] Matthew Mosk, *McCain Able to Skirt Limits of Federal Financing*, Wash. Post, Sept. 17, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/09/16/AR2008091603321.html. For more on the presidential joint fundraising committees in 2008, *see* Ctr. for Responsive Pol., *Joint Fundraising Committees*, http://www.opensecrets.org/pres08/jfc.php?cycle=2008 (last visited July 12, 2013).

raised "approximately $228 million through three [joint fundraising committees]."[10]

The total amount raised by presidential joint fundraising committees increased substantially in the 2012 elections. Romney's joint fundraising committee, Romney Victory, raised over $492 million, and Obama's committees, Obama Victory Fund and Swing State Victory Fund, raised over $460 million.[11]

All of this information is publicly available on the FEC's website, and it is improbable that appellants are unaware of these facts.[12] They therefore have no basis for their skepticism regarding the existence of joint fundraising.

The evidence also indicates that presidential joint fundraising committees were designed to ensure that the fundraising proceeds allocated to the participating party committees were in large part used to

---

[10] Michael E. Toner, *The Impact of Federal Election Laws on the 2008 Presidential Election*, *in* The Year of Obama: How Barack Obama Won the White House 149, 156 (Larry J. Sabato ed., 2009).

[11] Ctr. for Responsive Pol., *Joint Fundraising Committees*, http://www.opensecrets.org/pres12/jfc.php (last visited July 2, 2013).

[12] Fundraising totals for particular joint fundraising committees can be found using the FEC's online search engine, available at http://www.fec.gov/finance/disclosure/candcmte_info.shtml. Conducting an advanced search by committee type (i.e., "Joint Fundraising Committee") further reveals that there are over 300 joint fundraising committees active in 2013, confirming that the practice remains widespread.

benefit the "headlining" candidate. In 2012, Romney Victory accepted checks as large as $75,800,[13] and allocated $40,000 "to state GOP accounts in Idaho, Massachusetts, Oklahoma, and Vermont," none of which were swing states in the 2012 election.[14] These state parties were chosen as participants in the joint fundraising effort because they could be counted on to transfer the money to battleground states.[15] As a Republican fundraiser stated, "I guarantee the reason they're asking for those is [because] they can control them."[16] The fact that three of the four state parties receiving Romney Victory funds were headed by Romney loyalists "provide[d] the Romney camp with assurance that the money will be transferred to swing-state parties as the campaign desires and not be diverted to other efforts."[17]

In short, the use of joint fundraising as an informal means of "earmarking" contributions is far from

---

[13] *See* Kenneth P. Vogel & Abby Phillip, *Mitt Romney winning mega-donor war*, Politico, June 21, 2012, http://www.politico.com/news/stories/0612/77680.html.

[14] David M. Drucker, *Mitt Romney's Fundraising Boost Stems From Unique Tactic*, Roll Call, July 30, 2012, http://www.rollcall.com/issues/58_13/Mitt-Romneys-Fundraising-Boost-Stems-From-Unique-Tactic-216525-1.html.

[15] *Id.*

[16] *Id.*

[17] Paul Blumenthal, *Romney Victory Raises $140 Million, Exploits Campaign Finance Loophole*, Huffington Post, July 16, 2012, http://www.huffingtonpost.com/2012/07/16/romney-victory-fundraising_n_1675231.html.

"hypothetical," *see* McCutcheon Br. 44; it is now standard practice.[18]

C. Invalidation of the Aggregate Limits Would Multiply Candidate-to-Candidate Contributions and Reinvigorate the Practice of "Soft Money" Solicitations by Federal Candidates and Officeholders.

1. In the Absence of the Aggregate Limits, Candidates Could Participate in Massive Circumvention Schemes.

Eliminate the aggregate limits, and candidates would control two vehicles for large-scale circumvention – namely, their campaign committees and their leadership committees. A candidate may contribute

---

[18] Appellants also argue that prohibiting joint fundraising would be a more narrowly tailored solution for circumvention than retaining the aggregate limits. McCutcheon Br. 60. But this assertion – even insofar as it is relevant given that the "least restrictive means" test is inapplicable here, *see, e.g.*, *California Med. Ass'n v. FEC (CalMed)*, 453 U.S. 182, 199 n.20 (1981) – rests on the faulty premise that joint fundraising is the only means of circumventing the base contribution limits. But this Court has noted multiple ways that donors circumvent the contribution limits without earmarking. *Buckley* warned of the dangers entailed in the "use of unearmarked contributions to political committees likely to contribute to [preferred] candidates" even though joint fundraising had not been developed in any significant way in 1976. And in *Colorado II*, the Court expressed concern that a party "tallying" system, i.e., a party's informal records of its candidates' fundraising, furthered circumvention without necessarily triggering the earmarking restrictions. 533 U.S. at 459.

$4,000 from his campaign committee to another candidate in a two-year election cycle. 11 C.F.R. § 102.12(c)(2). In addition, candidates may establish a "leadership PAC," which is simply a multicandidate committee that is controlled or maintained by an officeholder or candidate. *See* 2 U.S.C. § 434(i)(8)(B); 11 C.F.R. § 100.5(e)(6). A leadership PAC, like any multicandidate committee, may contribute up to $5,000 to another candidate. 2 U.S.C. § 441a(a)(1)(C).

As discussed in Section I.A. *supra*, without the aggregate limits, donors could give more than $2.4 million to the campaign committees of their preferred party's candidates. They could also give to the leadership PACs that many candidates have established. These funds would not have to remain dispersed in the committees of 400 or more candidates. Donors could indicate with a "wink and a nod" or other informal means that certain recipients should transfer their contributions to their favored candidate. According to the FEC, there were 1,949 congressional candidates in the 2012 elections, and in addition, 532 active leadership PACs.[19] Even if only a fraction of these committees were willing to serve as conduits for a big donor seeking to circumvent the base limits,

---

[19] *FEC Summarizes Campaign Activity*, http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml. A candidate's campaign committee and his leadership PAC are not considered affiliated committees, *see* 11 C.F.R. § 100.5(g)(5). Consequently, each may separately contribute to a given candidate, and are not deemed to be a single committee for the purposes of the contribution limits.

there would still be potentially hundreds of committees available to this donor.

Further, to accomplish the circumvention scheme described above, a donor would not need to direct an elaborate conspiracy involving hundreds of candidates, but instead could simply request that the recipients of his largesse transfer the funds to a party committee. There is no prohibition on a donor "earmarking" contributions to a candidate for transfer *to a political party*. *See* 2 U.S.C. § 441a(a)(8). These contributions could then be aggregated in party coffers and ultimately spent to benefit the donor's preferred candidates.

Appellants and their *amici* suggest that these circumvention schemes are "implausible" or "hypothetical" but fail to recognize that there are significant incentives for candidates to serve as intermediaries in this scheme. *See* Br. of NRSC and NRCC as *Amici Curiae* Supp. Pls.-Appellants at 30. It is already typical for candidates to fundraise for other candidates and officeholders in their party. In 2012, leadership PACs contributed approximately $46 million to federal candidates, either by donating their own funds or serving as intermediaries for other contributors. *See* Ctr. for Responsive Pol., *Leadership PACs*, http://www.opensecrets.org/pacs/industry.php?txt=Q03&cycle=2012 (last visited July 10, 2013).[20] As *amici* NRSC

[20] Several PACs that were headed by non-federal or former federal officeholders were included in the tally, but their aggregate giving comprised less than $1.5 million. Ctr. for Responsive Pol., *Leadership PACs*, *supra*.

and NRCC admit, direct candidate-to-candidate giving is also significant: in 2012, contributions from candidate campaign committees to other candidate campaign committees totaled over $3.6 million. NRSC and NRCC Br. 29. The incentives for peer-to-peer giving are clear. Prolific contributors reap both the indirect benefit of enhanced political standing and clout among their peers, and the more tangible benefits of "prestige committee assignments, committee leadership positions, extended leadership positions and, in the majority party, . . . greater floor access for their legislation."[21] Therefore, it is customary for Members seeking key committee assignments or leadership positions to give generously to their peers: some of the biggest donors in 2012 were, unsurprisingly, Speaker of the House John Boehner's leadership PAC ($1,725,000 in contributions) and House Minority Whip Steny Hoyer's leadership PAC ($1,448,000 in contributions). Ctr. for Responsive Pol., *Leadership PACs*, *supra*.

The incidence of candidate-to-candidate contributions, as well as the entire phenomenon of leadership PACs, attests to the substantial advantages created by such giving. If aggregate limits were eliminated, big donors wishing to route money in excess of the base limits to their preferred candidates would likely

---

[21] Eric S. Heberlig & Bruce A. Larson, *Congressional Parties and the Mobilization of Leadership PAC Contributions*, 16 Party Pol. 451, 454 (2010) (internal citations omitted).

find a host of willing intermediaries among the candidates' peers.

2. Invalidation of the Aggregate Limits Would Allow Candidates to Solicit Multi-Million Dollar Checks, Recreating the Corruptive Practices That Necessitated the Bipartisan Campaign Reform Act.

Absent the aggregate limits, candidates would be able to solicit donors for huge sums of money that in appearance and effect would be the equivalent of "soft money donations," i.e., money not subject to the federal limits, but would be treated as the aggregation of numerous hard money contributions.

The Bipartisan Campaign Reform Act (BCRA) amended FECA to provide that federal party committees, as well as federal officeholders and candidates, "may not solicit, receive, or direct to another person a contribution, donation or transfer of funds or any other thing of value . . . that are not subject to [FECA's] limitations, prohibitions, and reporting requirements. . . ." 2 U.S.C. § 441i(a)(1), (e)(1). Otherwise put, a federal officeholder or candidate can only solicit, receive, direct or transfer hard money subject to the federal contribution limits.

These solicitation restrictions would be functionally nullified if the aggregate limits were to be invalidated. Because one donor would be able to give a joint fundraising committee a single check for over

$600,000 in funds that are subject to FECA's hard money limits, candidates would be able to solicit eye-popping sums while technically remaining in compliance with the solicitation restriction.

Further, candidates and parties would likely work together to ensure that candidates who solicit large amounts for their parties would also be the beneficiaries of the spending by their parties. In addition to joint fundraising practices, certain federal party committees have also employed a "tally system," wherein the party keeps informal records of the money that a candidate raises for her party and credits those funds to either that candidate's campaign or to any other candidates of her choice. *See, e.g., FEC v. Colorado Republican Fed. Campaign Comm.* (*Colorado II*), 533 U.S. 431, 459 (2001) (noting that tally system made party committees conduits for unearmarked contributions by "connect[ing] donors to candidates through the accommodation of a party"); *id.* at 460 n.23.

Thus, in a regime without aggregate limits, one can foresee that a candidate headlining joint fundraising efforts would make solicitations for massive contributions. As discussed in Section I.B., the "Entire Party Joint Fundraising Committee" comprised of all of the federal and state committees of the candidate's party would be able to raise over $600,000 per year and $1.2 million per election cycle from a single donor. The candidate could solicit donors for this amount, because such contributions will

technically be within the federal limits and are thus permitted by the solicitation restrictions. Once allocated to the participating party committees, the contributions could be transferred to a single party committee, where they could be used for the benefit of the candidate who participated in the fundraising effort and solicited the money. Such an arrangement would plainly enable a candidate to solicit huge contributions for her own campaign – she need only direct the money through a party joint fundraising committee with the understanding that the party committees would spend it for her benefit.

These scenarios are not fanciful. The history of campaign finance shows that when it comes to maximizing the raising and spending of campaign money, what can be done will be done. Only the aggregate limits now act as the critical bulwark against such easy and open circumvention of the underlying contribution limits.

II. The Governmental Interests That Were Found in *Buckley* to Support the Constitutionality of the Original $25,000 Aggregate Limit Support the Current Aggregate Limits.

A. The Aggregate Limits Block Circumvention of the Base Contribution Limits.

In *Buckley*, the Supreme Court found that the $25,000 aggregate limit was justified principally by

the governmental interest in preventing circumvention of FECA's base contribution limits, explaining:

> But this quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party.

424 U.S. at 38.

The *same circumvention schemes* outlined by *Buckley* remain possible today, and continue to justify the challenged aggregate limits. Absent the aggregate limits, contemporary donors could still circumvent the base contribution limits by making "unearmarked contributions to political committees likely to contribute to [their preferred] candidate." Similarly, without the challenged limits, donors could still route "massive amounts of money" to their preferred candidates by donating a "huge contribution" in the form of aggregated hard money contributions to the candidates' political party. Appellants' attempts to prove otherwise are untenable.

1. The $74,600 Aggregate Limit on Contributions to Party Committees and PACs

Appellants do not contest that *Buckley* explicitly sustained the $25,000 limit, the predecessor of the limits challenged here, on grounds that it deterred evasion of the base contribution limits. Attempting to escape this governing precedent, however, they claim that amendments to the law after *Buckley* now prohibit the circumvention feared by the *Buckley* Court, and that consequently the $74,600 aggregate limit is no longer justified.

In so arguing, appellants rely on a faulty and incomplete history of FECA's enactment and amendment. They also rely on an incorrect understanding of *Buckley*'s holding, claiming that the Court was motivated not by a broad concern about circumvention, but rather by much narrower fears of "political committee proliferation" and the specter of "unlimited" contributions to the political parties. Because appellants' premises fail, so too does their argument that the post-*Buckley* amendments to the law "solved" the "conduit contribution concern" identified in *Buckley*.

a. Appellants Rely Upon a Flawed History of FECA's Enactment.

At the time *Buckley* was decided, the original FECA had already undergone a round of amendments. *See* FECA Amendments of 1974 ("1974 Amendments"), Pub. L. No. 93-443, 88 Stat. 1263. In addition to the

aggregate limits, the 1974 Amendments added, *inter alia*, the following provisions relevant to this case:

- *Contribution limits*, including a $1,000 limit on contributions to candidates; and a $5,000 limit on contributions from a political committee (including party committee) to a candidate. *Id.* § 101(a), 88 Stat. at 1263 (codified as amended at 2 U.S.C. §§ 441a(a)(1)-(2)).

- *Party coordinated spending limits* restricting the amount a party could spend in coordination with their presidential, senatorial and congressional nominees. *Id.* § 101(a), 88 Stat. at 1265-66 (codified as amended at 2 U.S.C. § 441a(d)).

- An *earmarking provision* providing that contributions that were earmarked or "otherwise directed through an intermediary or conduit" to a candidate would be deemed a contribution from the original donor. *Id.* § 101(a), 88 Stat. at 1264 (codified as amended at 2 U.S.C. § 441a(a)(8)).

- A provision banning contributions "in the name of another." *Id.* § 101(f), 88 Stat. at 1267-68 (codified as amended at 2 U.S.C. § 441(f)).

Following the *Buckley* decision, the FECA Amendments of 1976 ("1976 Amendments"), Pub. L. No. 94-283, 90 Stat. 475, included a few additional provisions highlighted by appellants:

- *Additional contribution limits*, including a $20,000 limit on contributions to national party committees; and a $5,000 limit on contributions to multicandidate committees. *Id.* sec. 112(2), § 320(a)(1)(B)-(C), 90 Stat. at 487 (codified as amended at 2 U.S.C. §§ 441a(a)(1)(B)-(C)).

- A *transfer provision* providing that transfers between national state and local committees of the same political party are not subject to the contribution limits. *Id.* sec. 112(2), § 320(a)(4), 90 Stat. at 487 (codified as amended at 2 U.S.C. § 441a(a)(4)).

- An *"anti-proliferation" provision* stating that contributions from committees established, financed, maintained or controlled by the same corporation, union, organization or person would be deemed to have been made by a single political committee. *Id.* sec. 112(2), § 320(a)(5), 90 Stat. at 487-88 (codified as amended at 2 U.S.C. § 441a(a)(5)).

Appellants' description of this history is misleading. They are correct in stating that the "anti-proliferation" provision was passed in 1976, but this provision is not relevant to the function of the aggregate limit, as discussed in the following section.

Their discussion of the base contribution limits is fatally incomplete. It is true that in 1974, FECA contained no limits on contributions *to* political party committees or to PACs. It was not until 1976 that

Congress added a $20,000 limit on contributions to a national party committee, and a $5,000 limit on contributions to multicandidate PACs. *See* 1976 Amendments, sec. 112(2), § 320(a)(1)(B)-(C), 90 Stat. at 487. But appellants fail to mention that at the time of *Buckley*, candidates were limited in how much they could accept *from* party committees and multicandidate committees. Party committees and PACs could contribute only $5,000 to a candidate, although the parties were permitted to make a prescribed amount of coordinated expenditures in connection to a candidate as well. *See* 1974 Amendments, § 101(a), 88 Stat. at 1263, 1265-66; *see also Buckley*, 424 U.S. at 13 n.12, 35-36. Thus, even without the $25,000 aggregate limit, at the time of *Buckley*, a donor could not route an "unlimited" contribution through parties and PACs to a particular candidate.

Finally, appellants are simply wrong in suggesting that the earmarking provision included in the 1974 Amendments, § 101(a), 88 Stat. at 1264, and the "in the name of another" prohibition, *id.* § 101(f), were first enacted *after Buckley*. *See* McCutcheon Br. 42-43, 43 n.20; RNC Br. 38-39. Both were passed as part of the 1974 Amendments and were thus in effect when *Buckley* was decided.[22]

---

[22] Appellants' confusion may stem from the fact that the 1976 Amendments transferred these provisions – in language identical to then-existing law – from title 18 to title 2 of the U.S. Code. *See* H. R. Rep. 94-1057, at 53 (1976) (Conf. Rep.), *reprinted in* 1976 U.S.C.C.A.N. 946, 968.

b. Appellants Mischaracterize *Buckley* in an Attempt to Characterize the Aggregate Limits as Redundant.

After constructing this flawed history of FECA's enactment and amendment, appellants argue that the 1976 amendments to the law addressed *Buckley*'s circumvention concerns. But to make this argument, appellants must not only distort the history of the Act, but also must distort the holding of *Buckley*. In effect, they are "reverse-engineering" the concerns they claim informed the *Buckley* decision to "match" the changes to the law that postdated the decision: only by thus mischaracterizing the reasoning of *Buckley* can they maintain their unsustainable claim that subsequent amendments to the law rendered the aggregate limits obsolete.

Thus, because an "anti-proliferation" law was passed after *Buckley*, appellants unsurprisingly assert that the "analytical key" to the Court's decision to uphold the $25,000 aggregate limit was concern about donors giving to a "proliferation of political committees," i.e., multiple committees controlled by a single individual or entity. RNC Br. 17-18. Appellants claim that the 1976 Amendments to FECA fully addressed this concern, and therefore rendered the aggregate limits redundant. *Id.* at 21-22.

The problem with this argument is that the *Buckley* Court did not even mention "political-committee proliferation" in its analysis of the $25,000 aggregate limit, and certainly did not suggest that

political committees under common control represented the only avenue for circumvention. *See Buckley*, 424 U.S. at 38. The Court's decision to uphold the $25,000 aggregate limit was instead animated by the far broader concern that donors seeking to give contributions in excess of the federal limits to their favored candidate would simply channel "unearmarked contributions to political committees likely to contribute to that candidate." *Id.* The inapplicability of "political-committee proliferation" to the analysis of the $25,000 aggregate limit is made apparent by appellants' failure to offer any textual support other than a passage imported from an entirely different section of *Buckley*. RNC Br. 18 (citing 424 U.S. at 28 n.31) (discussing $1,000 base contribution limitation). Further, a plain reading of the Court's discussion of the type of circumvention that the aggregate limit thwarted – i.e., the donation of "unearmarked contributions to political committees *likely* to contribute to [the donor's preferred] candidate" – also contradicts appellants' proliferation argument. 424 U.S. at 38 (emphasis added). Multiple committees under the control of single donor are not merely *likely* to contribute to a preferred candidate; instead such committees will *certainly* contribute in the manner directed by this donor – that is the entire point of common control. *Buckley*'s articulation of the threat thus does not comport with the nature of appellants' "anti-proliferation" theory.

Second, appellants contend that the *Buckley* Court sustained the aggregate limit only because it

feared that otherwise individuals could make "unlimited" contributions to political parties and PACs, which then could be funneled to their preferred candidates. McCutcheon Br. 41. This alleged fear, according to appellants, was alleviated by the enactment of additional contribution limits by the 1976 Amendments. *Id.* at 41-42. But as described in the foregoing section, both party committees and PACs in 1974 were subject to limits on how much they could contribute to, or spend in coordination with, candidates. Thus, even without the $25,000 aggregate limit, the law at the time of *Buckley* would not have permitted donors to route "unlimited" contributions through parties and PACs to a particular candidate. Because the amount of money that could pass through a party or PAC was already restricted, the limits on contributions to a party or PAC added by the 1976 Amendments had at most a limited effect on circumvention.

Indeed, absent the aggregate limits, a donor today could route virtually as much money through a party committee to a candidate as she could have at the time of *Buckley*. To be sure, at the time of *Buckley*, the donor could have made unlimited contributions to a political party absent the aggregate limits. But, similarly, a donor today could contribute a massive sum exceeding $1 million to a party absent the aggregate limits: she would simply have to route the money through its three federal committees and 50 state committees. In 1975, the party in turn could have contributed $5,000 of this donation to the

donor's preferred House candidate[23] and made $10,000 in coordinated expenditures. 1974 Amendments, § 101(a), 88 Stat. at 1265-66. In 2013, the party could have contributed $5,000 of the donation to the donor's preferred House candidate and made $46,600 in coordinated expenditures. *See* FEC, *2013 Coordinated Party Expenditure Limits*, http://www.fec.gov/info/charts_441ad_2013.shtml (last visited July 19, 2013). Thus, although new contribution limits have been enacted post-*Buckley*, they have done little to block the circumvention that *Buckley* feared.

Finally, in a statement that flatly contradicts the holding of *Buckley*, appellants assert that this Court should only be concerned about circumvention when contributions to a party or PAC are "earmarked" for a particular candidate. Without this designation, appellants contend, a contribution funneled through a "pass-through" entity to a donor's candidate of choice "is non-cognizable as a conduit-contribution concern." RNC Br. 49.

Once more, appellants insinuate that the passage of new laws ameliorated the dangers of earmarked contributions. McCutcheon Br. 42-43 (suggesting that Congress specifically addressed problem of donors "channeling contributions through a PAC or political party committee"). But as the foregoing history of FECA confirms, the earmarking provision was

---

[23] These are the coordinated party spending limits for House candidates in states with more than one Representative.

enacted in 1974. Thus, the *Buckley* Court was aware that the law regulated earmarked contributions, *see* 424 U.S. at 23-24, and yet still found that the $25,000 aggregate limit was necessary to forestall circumvention schemes involving the donation of "*unearmarked* contributions to political committees likely to contribute to [a donor's preferred] candidate." 424 U.S. at 38 (emphasis added). Directly at odds with appellants' suggestion, it was precisely the flow of *unearmarked* contributions that gave rise to circumvention concerns.

Further, *Buckley* is hardly the only Supreme Court precedent to have found that unearmarked contributions can pose a danger of circumvention. For example, the plaintiffs in *Colorado II* argued that the coordinated spending limits were overbroad because any circumvention through parties could be more narrowly addressed by application or enhancement of the earmarking rules. 533 U.S. at 462. While not disputing that the earmarking rules might prevent some measure of circumvention – namely, "the most clumsy attempts to pass contributions through to candidates" – the Supreme Court rejected the argument that this regulation obviated the government's concerns. *Id.* As the Court noted, "[plaintiffs'] position . . . ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions." *Id.* Thus, far from endorsing appellants' claim that unearmarked contributions are by definition benign, the *Colorado II* Court rejected the

notion that "the earmarking provision [was] the outer limit of acceptable tailoring." *Id.*

In short, appellants have no basis for their misreading of *Buckley*, or for their contention that post-*Buckley* amendments addressed the concerns that the Court articulated there. An aggregate limit remains as relevant today as it was when *Buckley* was decided.

2. The $48,600 Aggregate Limit on Contributions to Candidates

As documented in Section I.C. *supra*, candidates reap significant rewards for contributing to, and serving as intermediaries for, other candidates and officeholders. Eliminate the aggregate limits, and donors seeking to purchase influence would use candidate campaign committees as yet another conduit for channeling donations to their favored candidates.

In addition, FECA permits candidates to transfer funds without limit to their political party, so contributions to individual candidates can easily be transferred to party coffers and aggregated for the benefit of a donor's preferred candidates. An influence-seeking donor would not need to communicate the details of the circumvention scheme every candidate to whom the donor contributes, but rather could simply direct recipients to transfer the donations to their party.

Nevertheless, appellants dispute that the $48,600 aggregate limit is supported by an anti-circumvention interest, alleging that "[*Buckley*] did not suggest a mechanism for how an unearmarked conduit-contribution might pass from an individual, through a candidate committee, to another intended, particular candidate." RNC Br. 54. But appellants are incorrect. *Buckley* stated broadly that the aggregate limit was necessary to avert circumvention schemes involving "unearmarked contributions to *political committees* likely to contribute to [a] candidate. . . ." 424 U.S. at 38 (emphasis added). The Court did not suggest that candidate committees were to be exempted from the category of "political committees" that could be used to circumvent the base limit, and appellants do not even attempt to provide any rationale for such an exemption.

Appellants also fail to acknowledge that *Buckley* can *only* be understood as upholding the challenged aggregate limit as applied to contributions to candidate committees. The $25,000 aggregate limit applied to contributions to party committees, PACs, and candidate committees and was upheld on its face by *Buckley*. If applying an aggregate limit to candidate contributions was unconstitutional, then the $25,000 limit would have been fatally overbroad. *See, e.g.*, RNC Br. 52 (arguing that if the $74,600 limit were invalidated as applied to federal party committees, the entire limit would be facially overbroad). At the least, Congress – or a court – would have to devise a narrower measure exempting contributions to candidate

committees from the limit. The *Buckley* Court could not have logically sustained the $25,000 limit without finding that it was constitutional to impose an aggregate cap on contributions to candidates.

Likewise unavailing is the argument that conduit schemes involving candidate committees cannot be corruptive, because no "'huge' contribution could be given to a candidate committee, so no 'massive' conduit-contribution could be channeled through one." RNC Br. 55. To be sure, individuals may only contribute $5,200 in an election cycle to a particular candidate, and candidate committees can only transfer $4,000 to another candidate committee per cycle. But appellants misunderstand the nature of the circumvention scheme. The danger is not that a donor will attempt to funnel a *single* large contribution through a candidate committee to her favored candidate, but rather that she will contribute *many* limited contributions to *many* candidate committees that will pass on these funds to her favored candidates. By blocking donors from routing hundreds of contributions to their preferred candidates through candidate committees, the aggregate limits are a crucial guard against political corruption.

B. The Aggregate Limits Directly Serve the Governmental Interest in Preventing Quid Pro Quo Corruption and the Appearance of Corruption.

Although *Buckley*'s discussion of the $25,000 aggregate limit focused primarily on its anti-circumvention purpose, the current aggregate limits also directly advance the goal of preventing actual and apparent corruption. As *Buckley* acknowledged, the government may legitimately prohibit not only quid pro quo corruption, but also practices that give rise to an appearance of such corruption. A single donor giving multi-million dollar sums to the candidates and committees of one party inarguably creates at least the appearance of impropriety.

Later cases have made the anti-corruption goals of the aggregate limits even more explicit. In *CalMed*, this Court explained that *Buckley* had upheld both the base limits on contributions to candidates and the $25,000 aggregate limit because "such limitations served the important governmental interests in preventing *the corruption or appearance of corruption* of the political process that might result if such contributions were not restrained." 453 U.S. at 194-95 & n.15 (emphasis added).

Most significantly, the Court in *McConnell* subsequently explained how large "soft money" contributions to federal and state party committees – contributions that are tantamount to the million-dollar sums in hard money that appellants propose here – create a

threat of actual and apparent corruption. Eliminating the aggregate limits would quickly result in a system of massive contributions to parties that would be indistinguishable from the system of "soft money" that was shut down by BCRA's enactment in 2002. *See* 540 U.S. at 144-45.

Appellants counter that "the anti-*corruption* interest is not directly implicated with contributions to national party committees," RNC Br. 25, but this theory was rejected in *McConnell*. There, this Court recognized that contributions to a candidate's party could create a sense of obligation no less than a direct contribution to the candidate himself, 540 U.S. at 144-45, and noted that "[t]his is particularly true of contributions to national parties, with which federal candidates and officeholders enjoy a special relationship and unity of interest." *Id.* at 145. Because of this "close affiliation," the national parties are placed "in a unique position, 'whether they like it or not,' to serve 'as agents for spending on behalf of those who seek to produce obligated officeholders.'" *Id.* (quoting *Colorado II*, 533 U.S. at 452). After surveying the voluminous record compiled by Congress in support of the soft money limits, the *McConnell* Court concluded that "there is substantial evidence to support Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption." *Id.* at 154.

McConnell also catalogued the dangers posed by the widespread practice of officeholders soliciting soft money for other candidates and their party's federal

and state committees. *See* 540 U.S. at 181-84; *see also id.* at 308 (Kennedy, J., concurring). The majority noted that "[l]arge soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder." *Id.* at 182. Justice Kennedy further expounded in his concurrence:

> The making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request). Rules governing candidates' or officeholders' solicitation of contributions are, therefore, regulations governing their receipt of *quids*. *This regulation fits under Buckley's anticorruption rationale.*

Id. at 308 (Kennedy, J., concurring) (emphasis added).

If the aggregate limits were to be invalidated, the soft money abuses deemed corruptive in *McConnell* would quickly resurface. Invalidating the aggregate limits would allow a single individual to donate over $1 million to a political party's federal and state party committees in a two-year election cycle. The federal and state party committees could transfer such contributions internally without restriction, and aggregate the contributions in the account of one recipient committee. There would be no functional difference between the massive sum of hard money contributions that appellants wish to legalize here and the soft money contributions outlawed by BCRA.

Further, as discussed in Section I.C. *supra*, officeholders gain power and influence on the Hill and in their parties by soliciting contributions for other candidates and their parties. In the absence of the aggregate limits, officeholders and candidates have every incentive to make solicitations for huge aggregate amounts – regardless of whether the money was ultimately used to support their own campaign, or the campaigns of others. Just as this Court found that solicitations by candidates for huge soft money contributions pose a danger of corruption or the appearance of corruption, so too would candidates' solicitation of donors for possibly millions of dollars in hard money contributions give rise to corruption and the appearance of corruption.

Contrary to appellants' suggestion, *Citizens United v. FEC*, 558 U.S. 310 (2010), did not question *McConnell*'s conception of corruption in connection to the soft money restrictions of Title I of BCRA. RNC Br. 37. *Citizens United* dealt with the entirely distinct question of whether Congress may regulate independent expenditures by corporations. *See id.* at 359. And this Court recently reaffirmed *McConnell*'s holding on Title I, when, after *Citizens United*, it summarily affirmed a three-judge district court decision that sustained BCRA's restrictions on party soft money. *RNC v. FEC*, 698 F. Supp. 2d 150 (D.D.C.), *aff'd*, 130 S. Ct. 3544 (2010) (mem.).

Moreover, although *Buckley* did not specifically consider limits on contributions to political parties, its analysis of corruption supports their constitutionality

and is consistent with *McConnell*. The *Buckley* Court emphasized that "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the *appearance of corruption* stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27 (emphasis added). *See also Citizens United*, 558 U.S. at 357 ("The *Buckley* Court . . . sustained limits on direct contributions in order to ensure against the reality or *appearance* of corruption.") (emphasis added). *Buckley* made clear that the government had a legitimate interest not only in outlawing "the most blatant and specific attempts of those with money to influence governmental action" but also in preserving public confidence in government by prohibiting practices that created an appearance of corruption. 424 U.S. at 27-28. Appellants all but ignore this fundamental aspect of the concept of corruption articulated in *Buckley*. Elimination of the aggregate limits would permit a single donor to contribute over $1 million to her favored party and over $2 million to that party's candidates in an election cycle. Appellants cannot credibly deny that this quantum of giving would not create the appearance that the party's candidates and officeholders were indebted to such donor – and unsurprisingly, appellants do not even attempt such a denial.

Appellants also advance a more targeted attack on the $74,600 aggregate limit, challenging it as applied to only the national party committees. *See* RNC Br. 24. Even this fallback position, however, would

allow a single individual to donate, and an office-holder to solicit, a total of $194,400 to the three national committees of a major political party in a two-year election cycle. And in addition to this $194,800, appellants propose that a donor also be permitted to meet his $48,600 sub-limit for contributions to state party committees and PACs, *see* RNC Br. 52-53, bringing the grand total of potential contributions to party committees to *$243,000*.[24] Although appellant McCutcheon claims that *Buckley*'s approval of the aggregate limit was motivated only by the fear of "*unlimited* contributions" to political parties, McCutcheon Br. 41, the text of the decision provides no support for this proposition. *Compare* 424 U.S. at 38 (expressing concern about "huge contributions" funneled through political parties to candidates).

---

[24] Appellants' final attempt to deny the corruptive potential of a $243,000 contribution to a political party is to assert that the Court cannot take into account the ability of party committees to make unlimited internal transfers when assessing the need for aggregate limits. According to appellants, Congress passed the intra-party transfer provision because it believed that there was "no conduit-contribution risk in transfers between federal committees of the same political party." RNC Br. 20. But appellants' theory about Congress' intent cannot be correct. The $25,000 aggregate limit was enacted as part of the 1974 amendments to FECA. The intra-party transfer provision was only first enacted in 1976. *See supra* Section II.A.1.a. Congress thus passed the transfer provision *after the enactment of the aggregate limit and in reliance on its existence*. Congress could not have considered the corruptive risk that unlimited intra-party transfers might pose in the absence of an aggregate limit.

Further, Supreme Court precedent on this subject indicates that sums as small as *$20,000* can be problematic when routed to candidates in addition to the base limit amount. *See, e.g.*, *Colorado II*, 533 U.S. at 457-58 (noting that donors could circumvent the base limits by giving, in addition to the base limits, $20,000 each year to a national party committee supporting the candidate). Clearly a contribution of $243,000 to a single party in an election cycle exceeds this standard.

Eliminating the aggregate limits would thus herald the return to a pre-*McConnell* era when enormous contributions to parties and candidates were freely solicited and often given by donors explicitly seeking favors from elected officials.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

TREVOR POTTER
Counsel of Record
J. GERALD HEBERT
TARA MALLOY
PAUL S. RYAN
MEGAN MCALLEN
THE CAMPAIGN LEGAL CENTER
215 E Street, N.E.
Washington, D.C. 20002
(202) 736-2200
tpotter@campaignlegalcenter.org

Counsel for Amici Curiae

Dated: July 25, 2013

APPENDIX A
Description of the *Amici Curiae*

AARP is a nonprofit, nonpartisan organization with a membership that helps people turn their goals and dreams into real possibilities, strengthens communities and fights for issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse. In particular, AARP engages in legal and legislative advocacy to secure public policies of benefit to older Americans. AARP recognizes the importance of federal regulation of campaign finances, so that all members of the electorate are able to express their preferences and have a realistic chance to be heard by candidates and public officials. AARP does not endorse candidates for public office or make contributions to political campaigns or candidates.

Asian Americans Advancing Justice (Advancing Justice) promotes a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities. Advancing Justice comprises four independent affiliates: Asian Americans Advancing Justice-AAJC, Asian Americans Advancing Justice-Asian Law Caucus, Asian Americans Advancing Justice-Chicago and Asian Americans Advancing Justice-Los Angeles. Advancing Justice has advocated for Asian Americans' equal access to the political process through litigation, public policy advocacy, community education and community mobilization. Advancing Justice sees campaign donations as one

of the ways in which Asian Americans can participate in the political process and have their voices heard.

Founded in 1974, the **Asian American Legal Defense and Education Fund (AALDEF)** is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all.

The Campaign Legal Center is a nonprofit, nonpartisan organization created to represent the public perspective in administrative and legal proceedings interpreting and enforcing campaign finance and other election laws throughout the nation. It participates in rulemaking and advisory opinion proceedings at the FEC to ensure that the agency is properly enforcing federal election laws, and files complaints with the FEC requesting that enforcement actions be taken against individuals or organizations that violate the law.

Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit, nonpartisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW monitors the activities of members of Congress and, where appropriate, files

ethics complaints with Congress. CREW also prepared written reports, including a yearly report it disseminates publicly about the most unethical members of Congress. CREW also has filed lawsuits seeking to stem the flow of anonymous money into our electoral system.

Common Cause is a nonprofit, nonpartisan citizens' organization with approximately 400,000 members and supporters nationwide. Common Cause has long been concerned with the growing problem of money in the federal political process, and has publicly advocated for appropriate regulation in order to restore integrity to the electoral system. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002.

The League of Women Voters of the United States is a nonpartisan, community based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in approximately 800 communities and in every state, with more than 140,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at

the state, local, and federal levels for more than three decades.

Progressives United is a nonprofit, nonpartisan organization created to educate policymakers, opinion leaders and the public about the corrupting influence of unlimited and corporate money in our political system. Progressives United was founded by former U.S. Senator Russ Feingold, co-author of the 2002 Bipartisan Campaign Reform Act.

Public Campaign is a nonprofit, nonpartisan organization dedicated to substantial reform of the current campaign finance system. Since 1997, Public Campaign has built a network of national and state-based efforts that aim to dramatically reduce the role of powerful special interest money in American politics and equally amplify the voices of all Americans in the electoral process. In addition to work with national reform groups, Public Campaign also works with a broad range of non-reform partners, including local community groups and national membership organizations around the country.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

FILED
MAY 13 2013

No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON AND
REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia

Brief of the Cato Institute as *Amicus Curiae* in Support of Plaintiffs-Appellants

ILYA SHAPIRO
Counsel of Record
SOPHIE COLE
Cato Institute
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

Library of Congress
Law Library

QUESTIONS PRESENTED

(1) Whether the biennial limits on campaign contributions to non-candidate committees, 2 U.S.C. 441a(a)(3)(B), violate the First Amendment; and, more broadly,

(2) Whether the distinction that this Court drew in *Buckley v. Valeo*, 424 U.S. 1 (1976), between limits on campaign expenditures (unconstitutional) and contributions (constitutional under certain circumstances), respectively, is still tenable.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE FIRST AMENDMENT BROADLY PROTECTS POLITICAL SPEECH 4

A. The Founders Envisioned Campaigns With Open Debate and Uninhibited Political Expression 6

B. The *Buckley* Court Correctly Held That Campaign Spending Is a Form of Speech Protected by the First Amendment and Foresaw the Dangers of Even Those Contribution Limits It Approved 8

II. *BUCKLEY*'S DISTINCTION BETWEEN CONTRIBUTIONS AND EXPENDITURES IS UNWORKABLE AND DESTABILIZES OUR CAMPAIGN FINANCE SYSTEM 9

A. The *Buckley* Distinction Is Untenable and Unworkable 9

B. The *Buckley* Distinction Has Destabilized Our Campaign Finance System 13

C. Eliminating the *Buckley* Distinction Would Both Energize Our Democracy and Reduce Corruption 16

III. *STARE DECISIS* SHOULD NOT SAVE THE *BUCKLEY* DISTINCTION 17

A. *Stare Decisis* Means Following The Law, Not Mechanically Preserving Every Precedent or Maintaining Erroneous Decisions 17

B. Abandoning the *Buckley* Distinction Would Be Consistent with *Stare Decisis* 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

CASES

Agostini v. Felton,
521 U.S. 203 (1997) 21

Buckley v. Valeo,
424 U.S. 1 (1976) ..... *passim*

Burnet v. Coronado Oil & Gas Co.,
285 U.S. 393 (1932) 21

Calif. Med. Assn. v. FEC,
453 U.S. 182 (1981) 9

Citizens United v. FEC,
558 U.S. 310 (2010) 6, 7, 14, 24

Colo. Republican Fed. Campaign Comm. v. FEC,
518 U.S. 604 (1996) 3, 10, 11

FEC v. Nat'l Conservative Pol. Action Comm.,
470 U.S. 480 (1985) 11-12

FEC v. Wisc. Right to Life, Inc. ("*WRTL II*"),
551 U.S. 449 ..... 21-22, 24

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 19-20

McConnell v. FEC,
540 U.S. 93 (2003) 10-11

McCutcheon v. FEC,
893 F. Supp. 2d 133 (D.D.C. 2012) 12

Mills v. Alabama,
384 U.S. 214 (1966) 3, 7

Montejo v. Louisiana,
556 U.S. 778 (2009) 24

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964) 5

Nixon v. Shrink Missouri Gov't PAC,
528 U.S. 377 (2000) 10

In re Osborne,
76 F.3d 306 (9th Cir. 1996) 20-21

Patterson v. McClean Credit Union,
491 U.S. 164 (1989) 20, 21

Payne v. Tennessee,
501 U.S. 808 (1991) 19, 21

Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992) 23

Roth v. United States,
354 U.S. 476 (1957) 1, 5

Smith v. Allwright,
321 U.S. 649 (1944) 23

SpeechNow.org v. FEC,
599 F.3d 686 (D.C. Cir. 2010) 14

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, section 4 7

U.S. Const. art. II, section 1 7

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. X 4

OTHER AUTHORITIES

Lillian R. BeVier, *Money and Politics: The First Amendment and Campaign Finance Reform*, 73 Cal. L. Rev. 1045 (1985) 12

William Blackstone, *1 Commentaries* (Univ. of Chicago Press 1979) (1765) 18, 19

John J. Coleman, *The Benefits of Campaign Spending*, Cato Institute Briefing Paper No. 84 (September 4, 2003) 16, 17

John Coleman, *The Distribution of Campaign Spending Benefits across Groups*, 63 J. Pol. 916 (2001) 16

John Coleman & Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. Pol. 757 (2002) 16

Cong. Research Serv., *Supreme Court Decisions Overruled by Subsequent Decision*, (1992) 22

Dhammika Dharmapala & Filip Palda, *Are Campaign Contributions a Form of Speech? Evidence from Recent U.S. House Elections*, 112 Pub. Choice 81 (July 2002) 16-17

The Federalist No. 10 (James Madison) (Garry Wills ed. 2003) 6

The Federalist No. 51 (James Madison) (Garry Wills ed. 2003) 6

Thomas L. Gais, *Campaign Contribution Limits: Cure or Curse?*, 22 Regulation 42 (1999) 13

Matthew Hale, *The History of the Common Law of England* (Charles M. Gray ed. 1971) (1820) .. 17-18

James Kent, *1 Commentaries on American Law* (12th ed. 1989) (O.W. Holmes Jr. ed. 1873) 18, 19, 23

Raymond La Raja, *Small Change: Money, Political Parties, and Campaign Finance Reform* (2008) 15

Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 St. Louis U. L.J. 789 (1998) 9, 13-14

David M. Rabban, *Free Speech in Its Forgotten Years* (1997) 7

John Samples, *Move to Defend: The Case against the Constitutional Amendments Seeking to Overturn* Citizens United, Cato Institute Policy Analysis No. 724 (April 23, 2013) 5

John Samples, *The Fallacy of Campaign Finance Reform* (2006) 12, 17

Ilya Shapiro & Caitlyn McCarthy, *So What If Corporations Aren't People?*, 44 J. Marshall L. Rev. 701 (2011) 6

Ilya Shapiro & Nicholas Mosvick, Stare Decisis *after* Citizens United: *When Should Courts Overturn Precedent*, 16 Nexus: Chap. J. Pub. Pol'y 121 (2011) 20

Geoffrey R. Stone, *Is Money Speech?*, Huffington Post (February 5, 2012) 7-8

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The present case concerns Cato because it involves arbitrary and unjustified restrictions on political speech, the protection of which is at the core of the First Amendment.

SUMMARY OF ARGUMENT

The First Amendment broadly protects political expression in order to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Campaign contributions and expenditures facilitate such interchanges and are thus vital to our democracy. Yet our current campaign finance restraints unconstitutionally stifle political speech and inhibit the unfettered interchange of ideas.

---

[1] Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission.

While someone can spend an unlimited amount on his own campaigns, the amount he can donate to political parties, committees, and candidates is strictly limited by contribution limits that were upheld against constitutional challenge in *Buckley v. Valeo*, 424 U.S. 1 (1976).

Buckley correctly held that the spending money, whether in the form of contributions or expenditures, is a form of speech protected by the First Amendment. *Buckley*, 424 U.S. at 21. The Court, however, only treated caps on campaign expenditures, and not caps on contributions, as restrictions upon political speech, reasoning that "while contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* The Court has since abandoned the concept of "speech by proxy" generally, yet the distinction between contributions and expenditures remains. That distinction has been the target of persistent, cogent criticism and its underlying logic repudiated in subsequent decisions.

Even in *Buckley* itself, Chief Justice Burger argued that contributions and expenditures are both core political speech and "two sides of the same First Amendment coin." *Id.* at 241 (Burger, C.J., concurring in part and dissenting in part). Restrictions on both violate the Constitution. *Id.* at 241-42. Justice Thomas has also attacked the distinction as illogical and argued that both contribution and expenditure limits implicate core First Amendment values. Money contributes to the political debate whether it is spent independently or through a candidate or political party. *Colo. Fed.*

Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 636-67 (1996) (Thomas, J., concurring in part and dissenting in part). Justice Thomas asserted that the *Buckley* framework should be abandoned and replaced with a strict scrutiny test for both contributions and expenditure limits. *Id.* at 639.

Buckley's contribution/expenditure distinction also causes various practical issues commonly criticized in our campaign finance system. Striking down limits on spending, while upholding limits on donations, creates a system where politicians spend an inordinate amount of time fundraising as opposed to designated legislative activities. Furthermore, the flow of money has been pushed away from political parties and official associations and towards unelected advocacy groups, leaving the national parties with a distinct lack of "resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Most importantly, the constitutional rights of U.S. citizens to engage in untempered political speech and expression is being infringed. Limitations on the amount of money an individual can contribute to the political party, committee, or candidate of his choice unconstitutionally restrains the freedom of political speech. There is "practically universal agreement" that the central purpose of the Speech and Press Clauses of the First Amendment was "to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Since money is speech, contribution limits effectively allow speech but only up to a government-approved amount.

Nor does *stare decisis* require preserving contribution limits, including the aggregate biennial limits being challenged in this case. The *Buckley* distinction is of relatively recent constitutional

vintage and has produced an arbitrary, irrational, and increasingly unworkable campaign finance system, with no reliance interests weigh against overruling it. *Stare decisis* is an important principle vital to our legal system but it is not a binding command by which a court never overrules precedent. Instead, it is a prudential policy that—especially in the context of constitutional interpretation—doesn't prevent overruling decisions offensive to the First Amendment.

Free speech fosters political change, holds officials accountable, and sustains all other facets of a healthy democracy. Limits on individual donations impede robust political speech. *Amicus* respectfully submits that the *Buckley* distinction was made in error and that the instant challenge presents the Court an opportunity to liberate political speech. Not only would this energize our democracy, reduce corruption, and keep with *stare decisis*, it would also be consistent with the Constitution.

ARGUMENT

I. THE FIRST AMENDMENT BROADLY PROTECTS POLITICAL SPEECH

The Constitution protects individual liberty by enumerating the finite list of powers granted to the federal government and reserving all others to the states and the people. U.S. Const. amend. X. The First Amendment, in turn, broadly protects political expression in order to assure the unfettered exchange of ideas to advance the laws and policies

desired by the people. *Roth v. United States*, 354 U.S. 476, 484 (1957). Congress lacks the authority to make laws that unduly restrict an individual's ability to participate in the political process.

It is well-settled that "the central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Free speech "is needed for republican government" and "informs voters about the conduct of elected officials, thereby helping voters to hold officials responsible at election time." John Samples, *Move to Defend: The Case against the Constitutional Amendments Seeking to Overturn* Citizens United, Cato Institute Policy Analysis No. 724 (Apr. 23, 2013), at 2. "Officials in power have every reason to fear speech. It fosters change, not least in elections. Elected officials have strong reasons to find acceptable ways to suppress free speech." *Id.* at 3.

Moreover, the First Amendment protects political speech regardless of the nature or identity of the speaker. People don't lose their rights upon coming together and forming associations, be they unions, non-profit advocacy groups, private clubs, for-profit corporations, or any other form. *See, e.g.*, Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. Marshall L. Rev. 701, 707-08 (2011). Restrictions on campaign donations—particularly "aggregate" limits on election participation—impede robust political speech and thus rob our democracy of the vibrancy and dynamism it would otherwise have.

Indeed, restricting the liberty to engage in election campaigns because such engagement somehow injures the political system is fundamentally contrary to the constitutional structure of rights and powers. As James Madison said, "it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency." *The Federalist* No. 10, at 51-52 (James Madison) (Garry Wills ed., 2003). And as this Court recently held, "[i]f the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." *Citizens United v. FEC*, 558 U.S. 310, 313 (2010). Since monetary contributions to parties and campaigns are a form of political speech, they too are protected by the First Amendment.

A. THE FOUNDERS ENVISIONED CAMPAIGNS WITH OPEN DEBATE AND UNINHIBITED POLITICAL EXPRESSION

The Founders believed that elections are the principal means of controlling government. *See, e.g.*, *The Federalist* No. 51, at 316 (James Madison) (Garry Wills ed., 2003) ("A dependence on the people is no doubt the primary control on the government."). Elections make politicians accountable to voters, which constrains the government monopoly on the legitimate use of force. If electoral competition ceases to exist, the Madisonian nightmare of government without effective restraints becomes possible.

That's why a "major purpose" of the First Amendment is "to protect the free discussion of

governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), by limiting the government's interference with the marketplace of ideas, especially political ideas. Free and open debate is "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 15.

While Article I, Section 4, and Article II, Section 1 authorize Congress to regulate federal elections, that regulation must be consistent with the First Amendment. As noted above, the Founders created the First Amendment to ensure free and robust political debate. They didn't want such speech to be restricted by artificial limits on the means that are necessary for such debate—financial support. *See generally* David. M. Rabban, *Free Speech in Its Forgotten Years* (1997). Accordingly, this Court has held repeatedly that campaign contributions and expenditures are protected speech.

B. THE *BUCKLEY* COURT CORRECTLY HELD THAT CAMPAIGN SPENDING IS A FORM OF SPEECH PROTECTED BY THE FIRST AMENDMENT AND FORESAW THE DANGERS OF EVEN THOSE CONTRIBUTION LIMITS IT APPROVED

It is impossible to separate speech from the money that facilitates it. *See, e.g.*, *Citizens United*, 130 S. Ct. at 917 (Roberts, C.J., concurring) ("The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer."). "Not a single justice of the United States Supreme Court who has voted in any of the more than a dozen cases involving the constitutionality of campaign finance regulations,

regardless of which way he or she came out in the case, has *ever* embraced the position that money is not speech." Geoffrey R. Stone, *Is Money Speech?*, Huffington Post, Feb. 5, 2012, available at http://www.huffingtonpost.com/geoffrey-r-stone/is-money-speech_b_1255787.html.

Accordingly, this Court correctly held in *Buckley* that the spending of money, whether in the form of contributions or expenditures, is a form of speech protected by the First Amendment. 424 U.S. at 21. Candidates need to amass sufficient wealth to amplify and effectively disseminate their message to the electorate. *Id.* Restricting political contributions and expenditures "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 19. Contributions and expenditures facilitate this interchange of ideas and cannot be regulated as "mere" conduct unrelated to the underlying communicative act of making a contribution or expenditure. *Id.* at 24.

While the *Buckley* Court allowed certain restrictions on contributions—though not expenditures—it cautioned that they "could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21. Rapid technological progress has accentuated the money-speech dynamic, and this Court should now rethink those restrictions.

II. *BUCKLEY*'S DISTINCTION BETWEEN CONTRIBUTIONS AND EXPENDITURES IS UNWORKABLE AND DESTABILIZES OUR CAMPAIGN FINANCE SYSTEM

A. THE *BUCKLEY* DISTINCTION IS UNTENABLE AND UNWORKABLE

In *Buckley*, this Court decided to treat caps on campaign expenditures, but not campaign contributions, as restrictions upon political speech, reasoning that, "while contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21. Expenditure limits, by contrast, "represent substantial rather than merely theoretical restraints on the quality and diversity of political speech." *Id.* at 19. Accordingly, it declined to apply strict scrutiny to contribution limits. Subsequent to *Buckley*, a Court plurality described contributions as "speech by proxy" that are "not entitled to full First Amendment protection." *Calif. Medical Assn. v. FEC*, 453 U.S. 182, 196 (1981).

Yet the impact on the amount and diversity of political speech coming from contributions and expenditures is identical. "[T]here is no real difference between the First Amendment value of a contribution and an expenditure. A contribution is a quintessential act of political association just as an expenditure is an act of expression. Nor is there much difference between the real-world potential for corruption posed by each." Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 St. Louis U. L.J. 789, 795 (1998). Even

in *Buckley* itself, several justices questioned the viability of the contribution-expenditure distinction. Chief Justice Burger, for example, stated that "contributions and expenditures are two sides of the same First Amendment coin." *Buckley*, 424 at 241 (Burger, C.J., concurring in part and dissenting in part). Restrictions on both violate the Constitution. *Id.* at 241-42. Distinguishing them is playing "word games" because both types of political disbursements have sufficient communicative content to require that laws infringing them be struck down. *Id.* at 244.

Chief Justice Burger also added that restrictions on contributions unconstitutionally hamper political candidates and activity in the same way as restrictions on independent expenditures. *Id.* at 244. He pointed out that "contribution limitations . . . limit exactly the same political activity that the expenditure ceilings limit," *id.* at 243, specifically, by limiting the amount of funds that can later be spent. The result is "an effective ceiling on the amount of political activity and debate that the Government will permit to take place." *Id.* at 242. Yet the ability to project speech is *as important* as the ability to say it. A political writer would hardly be comforted if told that the First Amendment protects her words but not her access to the internet and printing presses.

Over time, various justices have criticized *Buckley*'s expenditure/contribution distinction. Justice Thomas has in particular assailed it. *See, e.g.*, *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 635-644 (Thomas, J., concurring in judgment and dissenting in part); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 410-429 (2000) (Thomas, J., dissenting); *McConnell v. FEC*, 540 U.S. 93, 265-286 (2003) (Thomas, J., concurring in part and dissenting

in part). Justice Thomas has written that the *Buckley* distinction lacks in "constitutional significance." *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 636. He also noted that contributions and expenditures both implicate core First Amendment values because they both facilitate political debate; whether political money is spent independently or through a candidate or political party is irrelevant. *Id.* at 636-67.

Justice Thomas suggested that *Buckley*'s framework be replaced with a strict scrutiny test to be applied to both contribution and expenditure limits. *Id.* at 639. Dissenting in part in *McConnell*, he appealed to history, observing that "repressive regimes have . . . attack[ed] all levels of the production and dissemination of ideas." 540 U.S. at 251 (2006) (Thomas, J., concurring in part and dissenting in part). He also traced some of the absurd consequences of the distinction: "What good is the right to print books without a right to buy works from authors? Or the right to publish newspapers without the right to pay deliverymen?" *Id.* at 252.

The Court has also come to repudiate the concept of "speech by proxy" generally:

> The "proxy speech" approach is not useful . . . [where] the contributors obviously like the message they are hearing from [the] organization and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as

> opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

FEC v. Nat'l Conservative Pol. Action Comm., 470 U.S. 480, 495 (1985).

Numerous academics have also criticized the *Buckley* distinction. For example, Prof. Lillian BeVier has argued that both contributions and expenditures implicate significant First Amendment values, and so they should be treated the same way. *See* Lillian R. BeVier, *Money and Politics: The First Amendment and Campaign Finance Reform*, 73 Cal. L. Rev. 1045, 1063 (1985). She argues that the distinction is merely semantic because contribution limits and expenditure limits restrict the same type of activity. *Id.* BeVier would also subject both contributions and expenditures to heightened scrutiny. *Id.* at 1090. The Cato Institute's resident political scientist, meanwhile, has noted that "[s]pending on elections by candidates and parties depends on spending by contributors. If candidates and parties do not raise money, they cannot spend it." John Samples, *The Fallacy of Campaign Finance Reform* 34 (2006).

In sum, *Buckley*'s distinction is untenable. As the court below acknowledged, "the constitutional line between political speech and political contributions grows increasingly difficult to discern." *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 136 (D.D.C. 2012). Having long been the target of persistent, cogent criticism, and with its underlying logic repudiated in subsequent rulings, this Court should abandon the contribution-expenditure distinction.

B. THE *BUCKLEY* DISTINCTION HAS DESTABILIZED OUR CAMPAIGN FINANCE SYSTEM

The *Buckley* distinction and resultant limits on contributions have also caused the most commonly criticized problems of our campaign finance system.

First, political candidates must spend an inordinate amount of time raising money due to the limits on the amount of each contribution. Candidates face an unlimited demand for campaign funds but a tapered supply, leading to more time spent fundraising as opposed to legislating. And the noose of contribution limits has only tightened due to inflation. Moreover, "because some political interests have access to methods of mobilizing small contributions, while many do not, campaign-finance regulations often have the effect of exacerbating inequalities in the influence of interests." Thomas L. Gais, *Campaign Contribution Limits: Cure or Curse?*, 22 Regulation 42, 43 (1999). In other words, contribution limits increase the time candidates spend on fundraising and exacerbate resource inequalities between different political interests.

Second, the *Buckley* distinction helps the wealthy and other influential voices drown out the speech of average citizens. The contribution limit has decreased the influence of individuals and increased the importance of media, lawyers, consultants, and professional fundraisers. The *Buckley* Court failed to foresee the "pragmatic impact" of the dichotomy that it created:

> In effect, the *Buckley* Court authorized government to regulate the size and source of campaign contributions, thus permitting

> significant regulation of the supply of funds to candidates, but forbade the government to place ceilings on expenditures, thus preventing any regulation of the demand for campaign funds. Any economist will tell you that an effort to regulate supply in the teeth of unlimited demand is a prescription for a black market. And that is exactly what happened to American politics.

Neuborne, *The Supreme Court & Free Speech*, at 795.

Third, contribution limits and other campaign finance regulations have gradually pushed the flow of money away from candidates and parties, towards unelected advocacy groups. This dynamic weakens the relative ability of campaigns to compete with special-interest groups, due to the increasing flow of campaign dollars through the direct independent-spending route. *Id.* And this trend was visible long before *Citizens United* and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). As an unsurprising consequence of the *Buckley* distinction, donation limits to party committees have reduced the campaign influence of all political parties—whether Republican, Democrat, Libertarian, Green, or otherwise—making the field safer for rich individuals who form their own Super PACs and other campaign devices. Candidates who are neither well-known nor well-heeled are put at a significant disadvantage, reducing political competition.

The *Buckley* Court cautioned that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S.

at 21. Parties don't enjoy any special constitutional status, to be sure, but they also shouldn't bear any legal disadvantage.

Yet one of the unintended consequences of the *Buckley* distinction has been "the dispersion of money and activities among candidates and 'shadow' party groups," reinforcing a "trend toward fragmented political campaigns." Raymond La Raja, *Small Change: Money, Political Parties and Campaign Finance Reform* 44 (2008). For Prof. La Raja, these "shadow" groups include 527s, Super PACs, and labor organizations. Like other critics, La Raja suggests that campaign finance regulation has largely left national parties as peripheral players with limited direct influence over campaigns and too little ability to coordinate activities with candidates. *Id.* at 156-57. Finding contribution limits to be unconstitutional would restore some of the balance by removing restrictions on the political parties and candidates, providing for a more equal footing.

The policy choice we face in campaign finance regulation is whether we prefer money to go directly to candidates and parties or whether we prefer that it be spent independently. Quite apart from the constitutional concerns raised by the appellants here, the current regulatory regime undermines the main goals of most campaign finance reformers: political accountability and open government. Contribution limits also undermine disclosure laws by inducing donors to seek third parties to spend on their behalf, bypassing the caps. This situation in turn blurs the connection between donors and the candidate or party they wish to support. The *Buckley* distinction and its concomitant contribution limits have thus caused a multitude of practical problems.

C. ELIMINATING THE *BUCKLEY* DISTINCTION WOULD BOTH ENERGIZE OUR DEMOCRACY AND REDUCE CORRUPTION

Our democracy would be energized if freed from contribution limits. More political speech leads to better informed voters, and the kind of speech fostered by campaign contributions—political ads—tends to educate voters who are less inclined to search out information on their own. *See* John J. Coleman, *The Benefits of Campaign Spending*, Cato Institute Briefing Paper No. 84 (September 4, 2003). *See also* John Coleman and Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. Pol. 757 (2002) (showing that campaign spending increases public knowledge of the candidates, including the ability to place them on ideological and issues scales); John Coleman, *The Distribution of Campaign Spending Benefits across Groups*, 63 J. Pol. 916 (2001) (arguing that campaign spending improves public trust and engagement and improves the accuracy of perceptions about candidates, particularly among socially disadvantaged groups). In other words, the speech facilitated by campaign contributions has a greater effect on those who, but for that campaign spending, would be ignorant of electoral issues.

Further, informing voters fosters electoral competition by facilitating more criticism of incumbents and creating more name recognition for challengers. Coleman, *The Benefits of Campaign Spending*, at 4-5. As mentioned above, "absent contribution limits, challengers could raise money quickly and easily from a small number of donors, if they wished." Dhammika Dharmapala and Filip

Palda, *Are Campaigns Contributions a Form of Speech? Evidence from Recent U.S. House Elections*, 112 Pub. Choice 81, 87 (July 2002). Treating contributions the same as expenditures would not only be consistent with the Constitution, but would solve the problems *Buckley* brought into being and also lessen corruption and the appearance thereof.

Contrary to what critics charge, "studies indicate that campaign spending does not diminish trust, efficacy, and involvement." Coleman, *The Benefits of Campaign Spending*, at 8. That's because "spending increases public knowledge of the candidates, across essentially all groups in the population. Less spending on campaigns is not likely to increase public trust, involvement, or attention. . . . Getting more money into campaign should, on the whole, be beneficial to American democracy." *Id.* Moreover, "a deregulated system of campaign finance should be expected to increase electoral competition." Samples, *The Fallacy of Campaign Finance Reform* 186. This competition would also reduce the power of incumbency and the corruption that can flow from it.

III. *STARE DECISIS* SHOULD NOT SAVE THE *BUCKLEY* DISTINCTION

A. *STARE DECISIS* MEANS FOLLOWING THE LAW, NOT MECHANICALLY PRESERVING EVERY PRECEDENT OR MAINTAINING ERRONEOUS DECISIONS

Stare decisis reflects the common law's declaratory view of precedent. Precedents are not law themselves, but instead are evidence of the law. *See, e.g.*, Matthew Hale, *The History of the Common Law of England* 45 (Charles M. Gray ed., 1971) (1820)

("the Decisions of Courts of Justice . . . do not make a Law . . . yet they have a great Weight and Authority in Expounding, Publishing, and Declaring what the Law of this Kingdom is."). As William Blackstone explained, *stare decisis* does not require courts to extend or preserve an earlier decision that misstated or misapplied the law:

> [A judge is] not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law; that is, that it is not the established custom of the realm as has been erroneously determined.

1 *Commentaries* 69-70 (Univ. of Chicago Press 1979) (1765).

Blackstone concluded that "*the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law." *Id.* at 71. Precedent is binding "unless it can be shown that the law was misunderstood or misapplied in that particular case." James Kent, 1 *Commentaries on American Law* 475, 477 (12th ed. 1989) (O.W. Holmes, Jr. ed. 1873).

Stare decisis also derives from practical

considerations of doctrinal stability in order to "keep the scale of justice even and steady." Blackstone, 1 *Commentaries* 69. It is appropriate in many cases because "[i]t is by the notoriety and stability of such rules that professional men can give safe advice . . . and people in general can venture with confidence to buy and trust, and to deal with one another." Kent, 1 *Commentaries* 476. From its origins, *stare decisis* was intended to balance reliance interests in doctrinal stability with the countervailing interest in clarification when in an earlier case "the judge may *mistake* the law." Blackstone, 1 *Commentaries* 71. The doctrine of *stare decisis* is basic and vital to our legal system, as inherited from the common law, yet we maintain important differences in our application of this traditional principle.

In the United States, *stare decisis* does not mechanically preserve every precedent. While the doctrine plays an important part in the Court's decision-making, it is not "an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991) ("*Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision."). *Stare decisis*, "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 827. A core principle underlying *stare decisis* is that courts do not make the law, but rather declare what the law is. *See, e.g., James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (although "judges in a real sense 'make' law . . . they make it *as judges make it*, which is to say *as though* they were 'finding' it—discerning what the

law *is*, rather than decreeing what it is today *changed to*, or what it will tomorrow be.") (Scalia, J., concurring in the judgment). Consequently, "precedents are not sacrosanct." *Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989).

In other words, *stare decisis* is not "a binding principle by which a court—the U.S. Supreme Court or otherwise—never overrules its own precedent. Indeed, if precedent could never be reversed then *Plessy v. Ferguson* and *Bowers v. Hardwick* could never have yielded to *Brown v. Board of Education* and *Lawrence v. Texas*, respectively." Ilya Shapiro & Nicholas Mosvick, Stare Decisis *after* Citizens United: *When Should Courts Overturn Precedent*, 16 Nexus: Chap. J. Pub. Pol'y 121, 123-124. One lower court put it this way:

> *Stare decisis* is the policy of the court to stand by precedent; the term is but an abbreviation of *stare decisis et quieta non movere*—"to stand by and adhere to decisions and not disturb which is settled." Consider the word "*decisis*." The word means, literally and legally, the decision. Nor is the doctrine *stare dictis*; it is not "to stand by or keep to what was said." Nor is the doctrine *stare rationibus decidendi*—"to keep to the *rationes decidendi* of past cases." Rather, under the doctrine of *stare decisis* a case is important only for what it decides—for the "what," not for the "why," and not for the "how." Insofar as precedent is concerned, *stare decisis* is important only for the decision, for the detailed legal consequence following a detailed set of facts.

In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996).

This Court recognizes the importance of having settled rules of law. *See Agostini v. Felton*, 521 U.S. 203, 235 (1997). But *stare decisis* is a prudential policy rooted in the declaratory view of precedent and its underlying interests are not equally compelling for all areas of law. *See Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved"); *Patterson*, 491 U.S. at 172-73 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

Not surprisingly, *stare decisis* is most flexible in constitutional cases, where Congress cannot "fix" an undesired legal interpretation:

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07, 410 (1932) (Brandeis, J., dissenting).

Indeed, this "policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, 521 U.S. at 235. Moreover, "overruling a constitutional case

decided just a few years earlier is far from unprecedented." *FEC v. Wisc. Right to Life, Inc.* ("*WRTL II*"), 551 U.S. 449, 501 (2007) (Scalia, J., concurring in part and concurring in the judgment) (collecting cases). For example, in the 50 years from 1942 to 1992, this Court reversed itself 141 times. Cong. Research Serv., *Supreme Court Decisions Overruled by Subsequent Decision* (1992).

The Court has further explained the policy of *stare decisis* as follows:

> [W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions.

Smith v. Allwright, 321 U.S. 649, 665 (1944).

The present case turns on the proper interpretation of the First Amendment, of course, not on statutory construction or on property or contract rights. "This Court has not hesitated to overrule decisions offensive to the First Amendment (a 'fixed star in our constitutional constellation,' if there is one)—and to do so promptly where fundamental error was apparent." *WRTL II*, 551 U.S. at 500 (Scalia, J., concurring in part and concurring in the judgment) (internal citation omitted). Courts should not, and cannot, give as much judicial deference to constitutional decisions, as they would to common law cases or statutes. The doctrine of *stare decisis* is thus at its apogee here.

B. ABANDONING THE *BUCKLEY* DISTINCTION WOULD BE CONSISTENT WITH *STARE DECISIS*

The *Buckley* distinction does not survive scrutiny under the factors that courts consider in applying *stare decisis*: how well-reasoned and old the original opinion is; how much people have relied on it; and how well the resulting legal rule works.

The contribution-expenditure distinction, controversial and confusing in its own day, has not engendered the kind of reliance interests that *stare decisis* contemplates protecting. There are no contract or property rights at issue and no one has "ordered their thinking and living" *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992), in reliance on the continued viability of the *Buckley* distinction. *See* Kent, 1 *Commentaries* 443 (*stare decisis* helps ensure "people in general can venture with confidence to buy and trust, and to deal with one another."). On the contrary, restrictions on contributions have had a chilling effect on the exercise of the constitutional right to freedom of speech. No one is relying on having less freedom of speech, so no reliance interests weigh in favor of extending or preserving the distinction.

In fact, the only entities "relying" on the *Buckley* distinction are the oft-criticized "independent spending groups," such as Super PACs, which dominated the airwaves during the 2012 election cycle. Those groups partially depend on the contribution limits to funnel money in their direction. Yet it turns common sense and the First Amendment on their heads to say that one group is "relying" on the First Amendment rights of another

group being squelched. That absurdity only underscores the dangers of this Court drawing distinctions that micromanage political speech as if elections were no different than other businesses the federal government regulates. Many businesses, of course, "rely" on federal policies that disproportionately hamstring their competitors, but this Court should not maintain a distinction that that prefers one type of speaker over another.

Another "relevant factor" under *stare decisis* is "the antiquity of the precedent." *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). *See also WRTL II*, 551 U.S. at 501 ("Overruling a constitutional case decided just a few years earlier is far from unprecedented."). But *Buckley* is relatively recent. Further, by deviating from First Amendment principles, the *Buckley* distinction created an unworkable regulatory regime riddled with increasingly arbitrary exemptions, which are irreconcilable with the "corruption" interest conceived in the case. All Americans should be free to engage unfettered in constitutionally protected speech.

As Chief Justice Roberts wrote in *Citizens United*, "when fidelity to any particular precedent does more to damage this constitutional ideal [the rule of law] than to advance it, we must be more wiling to depart from that precedent." 558 U.S. 310, 378 (2010) (Roberts, J., concurring). *Stare decisis* does not require preserving or extending precedents that misstate the law. As such, it does not shield the distinction created in *Buckley* from being reexamined and overturned.

CONCLUSION

The aggregate contribution limits that stem from the *Buckley v. Valeo* contribution/expenditure distinction are an unjustified infringement of the First Amendment. This Court should reverse the decision below and remand for entry of a permanent injunction.

Respectfully submitted,

ILYA SHAPIRO
Counsel of Record
SOPHIE COLE
Cato Institute
1000 Mass. Ave., NW
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

MAY 13, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
MAY 13 2013
OFFICE OF THE CLERK

No. 12-536

In the Supreme Court of the United States

SHAUN MCCUTCHEON, *ET AL.*
APPELLANTS

v.

FEDERAL ELECTION COMMISSION
APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Brief of Cause of Action Institute As *Amicus Curiae* Supporting Appellants

BARNABY W. ZALL
Counsel of Record
Weinberg, Jacobs
& Tolani, LLP
7018 Tilden Lane
Rockville, MD 20852
(301) 231-6943
bzall@bzall.com

Daniel Z. Epstein
Hallee Morgan
Justin Meyers
Marie Connelly
Robyn Burrows
Karen Groen
CAUSE OF ACTION
INSTITUTE
1919 Pennsylvania Ave.,
N.W.
Washington, D.C. 20006

Library of Congress
Law Library

QUESTIONS PRESENTED

Appellants present five questions:

1. Whether the biennial limit on contributions to non-candidate committees, 2 U.S.C. § 441a(a)(3)(B), is unconstitutional for lacking a constitutionally cognizable interest as applied to contributions to national-party committees.

2. Whether the biennial limits on contributions to non-candidate committees, 2 U.S.C. § 441a(a) (3)(B), are unconstitutional facially for lacking a constitutionally cognizable interest.

3. Whether the biennial limits on contributions to non-candidate committees are unconstitutionally too low, as applied and facially.

4. Whether the biennial limit on contributions to candidate committees, 2 U.S.C. § 441a(a)(3)(A), is unconstitutional for lacking a constitutionally cognizable interest.

5. Whether the biennial limit on contributions to candidate committees, 2 U.S.C. § 441a(a)(3)(A), is unconstitutionally too low.

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iv

Statement of Interest 1

Statement of Context 3

Summary of Argument 7

Argument 9

I. The Aggregate Limits Are Not Narrowly Tailored to the Government's Interest in Avoiding Circumvention of the Individual Contribution Limits 11

A. The Aggregate Limits Are No Longer Needed Because "Fully Disclosed" Means Something Different Now Than in 1974 . 11

1. In 1974, Information About Candidates and Donors Was Not Easily Accessible .. 12

2. Today, Information About Candidates and Donors Is Readily Available 17

B. The New Freedom to Make "Independent Expenditures" Has Removed the Major Incentive to Circumvent the Individual Limits 24

C. The Major Effect of the Aggregate Limits in a Smartphone Era Is an Impermissible "Leveling" of Speech 30

Conclusion 35

TABLE OF AUTHORITIES

Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) 31

Buckley v. Valeo, 424 U.S. 1 (1976).....*passim*

Buckley v. *Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (en banc), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).....13

Bullock v. Carter, 405 U.S. 134 (1972).....34

Cause of Action v. Nat'l Archives & Records Admin., No. 12-1342, 2013 U.S. Dist. LEXIS 28725 (D.D.C. Mar. 1, 2013).....1

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).....*passim*

Connally v. General Constr. Co., 269 U. S. 385 (1926).....25

Doe v. Reed, 130 S.Ct. 2011 (2010).....5

Federal Election Commission v. Beaumont, 539 U.S. 146 (2003).....26

Federal Election Commission v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986).....25, 26

Federal Election Commission v. Nat'l Right to Work Comm., 459 U.S. 197 (1982).....14

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978).....14

McConnell v. FEC,
540 U.S. 93 (2003).....33

Meyer v. Grant, 486 U.S. 414 (1988).....25

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000)
.....10, 11, 23, 34

Roth v. United States, 354 U.S. 476 (1957) 9

SpeechNow.org v. Federal Elections Commission,
599 F.3d 686 (D.C.Cir.2010).....25, 28

U.S. v. Whittemore, No. 12–CR–0058, 2013 U.S. Dist. LEXIS 57198 (D. Nev. Apr. 18, 2013) 9

Statutes

Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 14

Federal Corrupt Practices Act of 1925 (Title III of the Act of Feb. 28, 1925), 43 Stat. 1070 14

Federal Election Campaign Act of 1971,
92 P.L. 225; 86 Stat. 3 (1972) 13, 14, 15, 21, 23

2 U.S.C. § 441a(a)(3) (2012).....15

5 U.S.C. §§ 552, *et seq*.....1

26 U.S.C. § 6104(d)(3) 27

Books and Articles

Bill Allison, *Daily Disclosures*, Sunlight Found. (Oct. 18, 2013, 12:43 PM), http://sunlightfoundation.com/blog/2010/10/18/daily-disclosures-10/ 26

Paul Atkins, *SEC Should Reject Partisan Ploy*, USATODAY, May 1, 2013, http://www.usatoday.com/story/opinion/2013/05/01/sec-political-donations-disclosure-rule-editorials-debates/2128009/.....32

Joseph M. Birkenstock, *Three Can Keep a Secret, If Two of Them Are Dead: A Thought Experiment Around Compelled Public Disclosure of "Anonymous" Political Expenditures*, 27 J.L. & POLITICS 609 (2012) 27

Paul Blumenthal, *'Dark Money' in 2012 Election Tops $400 Million*, HUFFINGTON POST (Nov. 2, 2012), http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html.....26

Center for Responsive Politics, *2012 Spending Will Reach $6 Billion*, Open Secrets Blog (Oct. 31, 2012) http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html 26

Center for Responsive Politics, *Reelection Rates Over the Years*, OpenSecrets.org, http://www.opensecrets.org/bigpicture/reelect.php 33

Current Issues in Campaign Finance Law Enforcement: Hearing Before the Subcomm. On Crime and Terrorism, S. Comm. On the Judiciary 113 Cong. 3 (2013) (statement of Mythili Raman, Acting Assistant Att'y Gen., Criminal Div.) *available at* http://www.judiciary.senate.gov/pdf/4-09-13RamanTestimony.pdf ..... *passim*

Yasmin Dawood, *Electoral Fairness and the Law of Democracy*, 62 U. Toronto L.J. 499 (2012) 33

Katie Denshaw, *Social media becoming crucial political tool,* PHILADELPHIA INQUIRER, April 26, 2013, http://articles.philly.com/2013-04-06/news/38329744_1_social-media-president-obama-mitt-romney 18

Tim Dickinson, "How President Obama Won A Second Term," ROLLING STONE, Nov. 23, 2012, http://www.rollingstone.com/politics/news/how-president-obama-won-a-second-term-20121123#ixzz2QdnM5cjL 29

E.J. Dionne, Jr., "Fighting big money with big money," WASH. POST, Mar. 27, 2013, http://www.washingtonpost.com/opinions/ej-dionne-michael-bloomberg-and-fighting-money-with-money/2013/03/27/54fa52d4-96f5-11e2-b68f-dc5c4b47e519_story.html 29

Tom Donnelly, *Candidate Venture Capital*, 80 U. CIN. L. REV. 753 (Spring 2012) 22, 33

Sasha Eisenberg, *How President Obama's campaign used big data to rally individual voters*, MIT TECH. REV. (Dec. 16, 2012), http://www.technologyreview.com/featuredstory/508836/how-obama-used-big-data-to-rally-voters-part-1/ 7

Federal Election Commission, Advisory Opinion 2010-11 (Commonsense Ten), *available at* http://saos.nictusa.com/aodocs/AO%202010-11.pdf 28

Federal Election Commission, *First Ten Years Report* (1985), *available at* http://fec.gov/pdf/firsttenyearsreport.pdf. 12, 13, 15

Federal Election Commission, *Performance and Accountability Report for FY 2012* (Nov. 15, 2012), http://www.fec.gov/pages/budget/fy2012/FEC_PAR_FY_2012-Final.pdf 18

Federal Election Commission, *Quick Answers to Disclosure Questions*, www.fec.gov/ans/answers_disclosure.shtml (last visited Apr. 8, 2013) 17

Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super PACs*, 60 DRAKE L. REV. 755 (2012) 27

Alana Goodman, *Lobbying for Action: OFA Registers as lobbyist in NY despite anti-lobbyist positions*, WASH. FREE BEACON, Apr. 12, 2013, http://freebeacon.com/lobbying-for-action/ 27

Pam Greenberg, *Social Media: Becoming a Trusted Source for Political Information," The Thicket at State Legislatures, Nat'l Conf. of State Legislatures*, Feb. 6, 2013, http://ncsl.typepad.com/the_thicket/2013/02/social-media-becoming-the-go-to-source-for-political-information-.html. 4

Billy Hallowell, *Meet the 5 Biggest Donors to the Obama & Romney Campaigns*, THE BLAZE (Oct. 19, 2012), http://www.theblaze.com/stories/2012/10/19/meet-the-5-biggest-donors-to-the-obama-romney-campaigns/ 22

Craig Holman and Robert Stern, *Campaign Money on the Information Superhighway: Electronic Filing and Disclosure of Campaign Finance Reports,* Ctr. for Governmental Studies (Jan.1999), *available at* http://policyarchive.org/handle/10207/bitstreams/225.pdf..... 22

Samuel Issacharoff and Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (June 1999) 22

Robert Kahn and Vinton Cerf, *Al Gore and the Internet*,

http://web.eecs.umich.edu/~fessler/misc/funny/gore,net.txt, last visited Apr. 23, 2013 3

Ezra Klein, *We got way too excited over money in the 2012 elections*, Wash. Post, May 6, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/06/we-got-way-too-excited-over-money-in-the-2012-elections/ 29

Tim Lockette, *Alabama Campaign Finance Reports to Go Online*, Anniston Star, May 4, 2013, http://www.annistonstar.com/view/full_story/22472052/article-Alabama-campaign-finance-reports-soon-to-go-online?instance=home_news 16

Maureen ODanu, *Social Media Becoming Major News Source for Journalists*, Technorati, May 18, 2011, http://technorati.com/social-media/article/social-media-becoming-major-news-source/ 18

Kathleen Parker, *Beauty & the Beast*, Wash. Post, Apr. 12, 2013, http://www.washingtonpost.com/opinions/kathleen-parker-ashley-judd-and-rough-politics/2013/04/12/2dd331f6-a3a9-11e2-9c03-6952ff305f35_story.html.....5

James L. Regens & Ronald Keith Gaddle, THE ECONOMIC REALITIES OF POLITICAL REFORM: ELECTIONS & THE U.S. SENATE (1995) 13

John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations,*

(2003), *available at* http://www.irs.gov/pub/irs-tege/eotopicl03.pdf. 27

SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, FINAL REPORT, S. REP. NO. 93-981 (1974).....13

Kathleen Sullivan, Comment, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (Nov. 2010).....15

Kathleen Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311 21

Paul J. Weber, *Perry remembered as titan of spending*, Associated Press, Wash. Times, Apr.16, 2013 .....23, 31

Rachel Weiner, *Scott Prouty reveals himself as man who shot '47 percent' video*, Wash. Post, Mar. 13, 2013, http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/13/scott-prouty-reveals-himself-as-man-who-shot-47-percent-video/ 21

Fred Wertheimer, *A Challenge to President Obama's New 501(c)(4) Group*, Huffington Post (Jan. 29, 2013, 5:23 PM), http://www.huffingtonpost.com/fred-wertheimer/a-challenge-to-president-_b_2569105.html..... 27

Chris Young, Reity O'Brien & Andrea Fuller, *Corporations, pro-business nonprofits foot bill for judicial seminars*, Ctr. for Pub. Integrity:

Consider the Source, Mar. 28, 2013, http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars 5

Other Authorities

American Bridge 21st Century,
Who We Are,
www.americanbridgepac.org/about.....3, 21

Federal Election Commission,
Campaign Finance Disclosure Portal,
http://www.fec.gov/pindex.shtml.....18
Detailed Files About Candidates, Parties and Other Committees: Files By Election Cycle,
http://www.fec.gov/finance/disclosure/ftpdet.shtml#a2011_2012 17

Center for Responsive Politics
www.OpenSecrets.org.....19
http://www.opensecrets.org/bigpicture/index.php.....20
http://www.opensecrets.org/bigpicture/reelect.php.....33
http://www.opensecrets.org/earmarks/index.php.....19
http://www.opensecrets.org/elections.....19

Freedom of Speech (painting), Wikipedia,
http://en.wikipedia.org/wiki/Freedom_of_Speech_(painting).....3

Tampa Bay Times,
www.PolitiFact.com.....17

STATEMENT OF INTEREST

Amicus curiae Cause of Action Institute, Inc. ("CoA") is a non-partisan, non-profit organization that investigates, exposes, and fights federal government waste, fraud, and cronyism.[1] www.causeofaction.org. Cause of Action uses investigative, legal, and communications tools to educate the public about how transparency and accountability protects taxpayer interests and economic opportunity. On March 13, 2013, for example, CoA released a report on government agencies' compliance with the federal Freedom of Information Act, 5 U.S.C. §§ 552, *et seq.*, finding that federal agencies "continue to fall short of a culture of transparency in the Federal Government."[2] Thus, CoA has a unique perspective on the nature of "transparency" and "corruption" related to political speech, and hence on the arguments presented in this case.

---

[1] Pursuant to Rule 37.2(b), *amicus* certifies that counsel for Appellees have provided the Clerk with blanket consent to file amicus briefs, and counsel for Appellants have consented to the filing of this brief. Copies of the consents have been filed with the Clerk.

Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no such counsel, party or person other than the *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] www.gradingthegovernment.com. *See also Cause of Action* v. *Nat'l Archives & Records Admin.*, No. 12-1342, 2013 U.S. Dist. LEXIS 28725 (D.D.C. Mar. 1, 2013) (challenging Archivist's denial of access to Financial Crisis Inquiry Commission records).

CoA agrees with the Appellants' arguments and supports their request for reversal of the decision below. CoA writes separately to discuss the changing character of political interaction since *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and the effect of that change on the anti-circumvention rationale for the aggregate contribution limits. In *Citizens United* v. *Federal Election Commission,* the Court predicted: "Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues." 558 U.S. 310, 364 (2010). That day has arrived, and CoA will address how the historic anti-circumvention doctrine is inappropriate in today's technology-driven brutal and highly-efficient political environment.

STATEMENT OF CONTEXT

Norman Rockwell's painting "Freedom of Speech," features a man speaking in a town hall meeting – a lone individual speaking out in dissent and being accorded a respectful hearing.[3] But we no longer live in a Norman Rockwell world. A speaker today likely will be filmed by others, edited, analyzed and dissected by advocates or opponents, and pilloried or hailed within moments. "If you're at a town hall meeting, take out your iPhone and record it, we'd love to highlight your footage on our site." www.americanbridgepac.org/about.[4]

If Norman Rockwell were to paint "Freedom of Speech" today, the "town hall" would be much bigger. The speaker would be sitting in front of a computer or smartphone updating his blog or her Twitter feed, a voice heard by the Nation (or the world). The audience will have voluminous information, including detailed analyses of contributions (both objective and slanted), just a click away. This is political engagement and free speech in the twenty-first century. It is unlike anything that the judges and legislators of the last century imagined.[5]

---

[3] http://en.wikipedia.org/wiki/Freedom_of_Speech_(painting).

[4] http://www.americanbridgepac.org/about/ (last visited May 8, 2013).

[5] Perhaps not all. "As far back as the 1970s Congressman Gore ... was the first elected official to grasp the potential of computer communications to have a broader impact than just improving the conduct of science and scholarship." Robert Kahn and Vinton Cerf, "Al Gore and the Internet,"

With the advent of smartphone technology, this Court is examining the 1974 doctrine of anti-circumvention in an era of real-time campaign finance disclosure. In less than twenty minutes, a citizen-activist can identify every candidate who has taken a donation from the Appellants, then tweet, blog, email or text that information to a wider audience.

In *Citizens United,* the Court predicted: "Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues." 558 U.S. at 364. "Soon" has become "now."[6]

The result is an environment where historic assumptions about disclosure and corruption may be obsolete. "Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers." *Citizens United*, 558 U.S. at 364.

Modern politics may be appropriately considered a contact sport. *See Doe v. Reed*, 561 U.S.

---

http://web.eecs.umich.edu/~fessler/misc/funny/gore,net.txt, last visited May 8, 2013.

[6] "Americans increasingly place their trust in social media sources—almost as much as or more than they trust traditional news outlets, according to some recent surveys." Pam Greenberg, *Social Media: Becoming a Trusted Source for Political Information," The Thicket at State Legislatures,* Nat'l Conf. of State Legislatures, Feb. 6, 2013, http://ncsl.typepad.com/the_thicket/2013/02/social-media-becoming-the-go-to-source-for-political-information-.html.

__, __; 130 S.Ct. 2811, 2837 (2010) (Scalia, J., concurring) ("Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.").[7] A speaker today, however, requires more than "civic courage" to speak or associate, at least in the context of political campaign contributions.[8]

A contributor, especially one who wants to dissent from traditional party positions or promote a broad base of candidates, faces numerous governmental restrictions, perhaps requiring the speaker to establish a political committee, register with a government agency, and limit contributions or expenditures at particular times or in particular amounts. "As a practical matter, however, given the complexity of the regulations and the deference courts show to administrative determinations, a

---

[7] *See also* "But anyone pretending shock that opposition research includes discussions about a person's emotional or mental health has been dwelling in some alternate universe." Kathleen Parker, "Beauty & the beast," *The Washington Post*, April 12, 2013, http://www.washingtonpost.com/opinions/kathleen-parker-ashley-judd-and-rough-politics/2013/04/12/2dd331f6-a3a9-11e2-9c03-6952ff305f35_story.html.

[8] In other areas as well: *See, e.g.*, Chris Young, Reity O'Brien & Andrea Fuller, "Corporations, pro-business nonprofits foot bill for judicial seminars," *Center for Public Integrity: Consider the Source*, March 28, 2013, http://www.publicintegrity.org/2013/03/28/12368/corporations-pro-business-nonprofits-foot-bill-judicial-seminars. The "Find a Judge" tool, available at the Center for Public Integrity's *Consider the Source* website, allows anyone to choose a federal judge's name and link that judge to a corporation paying for a seminar the judge attended.

speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak." *Citizens United*, 558 U.S. at 335. As the incomprehensible contribution limit charts in Appellant RNC's opening brief indicate, these are complex and interlocking restrictions. Br. on the Merits for Appellant Republican Nat'l Comm., 17a–18a.

Thus, in today's Norman Rockwell "Freedom of Speech" painting, the lone Tweeter would have her lawyer on speed-dial on her smartphone. "Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights." *Citizens United*, 558 U.S. at 364. Aggregate limits were crafted in a time when the town hall was still the small room in a Rockwell painting. Now our town hall is so big that the entire nation participates in the conversation (though respectful listeners are rarer than many would prefer).

Yet the aggregate limit continues to stifle the "informative voices" of at least a few individuals with "civic courage." If the changing circumstances mean that the interests underlying the aggregate limit no longer justify the intrusions upon First Amendment rights, the balance must be re-examined.

In an era in which parties and campaigns compete not only with other like entities, but also with independent voices armed with the latest technology and an almost limitless ability to

uncover, analyze and publish contributor information,[9] does the rationale for the current aggregate limits survive?

SUMMARY OF ARGUMENT

Congress may have been correct, *in 1974*, to assume that even "full disclosure"[10] of campaign contributions was insufficient to prevent circumvention of the individual aggregate contribution limits. In 1974, "full disclosure" meant filing paper copies in isolated government offices, adding to a mountain of similar forms.

Today, however, "full disclosure" means something else. A vast industry of public and private researchers and analysts is primed to receive any contribution filings, cross-check the filings against other records and against patterns and profiles, and instantly report any seeming discrepancies, especially any seemingly large contributions. In light of this new public capacity for instantaneous analysis, the aggregate limits are not needed to protect the individual contribution limits.

In addition, after *Citizens United*, the new freedom to speak directly means that there is no reason for a speaker to attempt to evade the individual contribution limits. These alternative

---

[9] Sasha Eisenberg, *How President Obama's campaign used big data to rally individual voters*, MIT TECH. REV. (Dec. 16, 2012), http://www.technologyreview.com/featuredstory/508836/how-obama-used-big-data-to-rally-voters-part-1/.

[10] *See Buckley* v. *Valeo*, 424 U.S. 1, 78 (1976).

speech and association mechanisms are perfectly legal, and they make the aggregate limits irrelevant. As the Department of Justice recently testified, "We anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be criminally prosecuted. Instead, they are likely to simply make unlimited contributions to Super PACs or 501(c)s."[11]

The remaining effect of the aggregate limits is to punish those few donors who want to support more candidates directly than the aggregate limits permit. Thus the aggregate limits are simply another attempt to prevent persons of wealth (or those who seek to promote challengers or innovative candidates) from associating in the manner they choose. This "leveling the playing field" cannot be justified by the limited governmental interest in the aggregate limits.

The aggregate limits are no longer needed and are counterproductive to their expressed goal. The aggregate limits violate the First Amendment, and should be struck down.

---

[11] *Current Issues in Campaign Finance Law: Hearing Before Subcomm. On Crime & Terrorism of the S. Comm. On the Judiciary*, 113 Cong. 1 (2013) (statement of Mythili Raman, Acting Assistant Att'y Gen., Criminal Div.), *available at* http://www.judiciary.senate.gov/pdf/4-09-13RamanTestimony.pdf ("Raman Statement"), at 3.

ARGUMENT

It is important to recognize at the outset that the Appellants in this case are not seeking to exceed the individual contribution limits. They do not want to engage in "conduit" transactions in which they would give money to others to report in the others' names.[12]

Those conduit transactions remain illegal, and the Department of Justice is enforcing those rules. "Since 2010, the Department has successfully prosecuted more than a dozen cases involving campaign finance violations."[13] Assistant Attorney General Raman noted that seven of those prosecutions involved "conduit" violations.[14]

Discussion of public issues and debate on the qualifications of candidates are "integral to the operation of the system of government established by our Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484, (1957).

The aggregate limits at issue in this case curtail the number of candidates, PACs, and political

---

[12] *United States* v. *Whittemore*, No. 12–CR–0058, 2013 U.S. Dist. LEXIS 57198, at *16 (D. Nev. Apr. 18, 2013) (denying motion to suppress evidence of alleged conduit contributions).

[13] Raman Statement, *supra* note 11.

[14] *Id.* at 1-2.

party committees to whom a person can meaningfully contribute. In *Buckley*, however, the Court noted: "Even a 'significant interference' with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." 424 U.S. at 25 (internal citations omitted); *see also Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 388-89 (2000).[15] "The limited, additional restriction on associational freedom imposed by the overall ceiling is thus **no more than a corollary** of the basic individual contribution limitation that we have found to be constitutionally valid." *Buckley*, 424 U.S. at 38 (emphasis added).

Advances in technology, however, have shown that the aggregate limits are no longer necessary as a "corollary" to the individual limits; circumvention attempts can be discovered by both public and private reviews. New freedoms to speak after *Citizens United* undercut the incentive to circumvent the individual limits, and the Department of Justice anticipates fewer conduit contributions prosecutions. And the remaining lingering effect of the aggregate limits is to "level the playing field," which this Court does not permit.

---

[15] "We consequently proceeded on the understanding that a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well, and we held the standard satisfied by the contribution limits under review." *Shrink Mo. Gov't PAC*, 528 U.S. at 388.

The aggregate limits are obsolete and should be struck down. "The limits directly suppress the political speech of both contributors and candidates, and only clumsily further the governmental interests that they allegedly serve." *Shrink Mo. Gov't PAC,* 528 U.S. at 428 (Thomas, J., dissenting).

I. THE AGGREGATE LIMITS ARE NOT NARROWLY TAILORED TO THE GOVERNMENT'S INTEREST IN AVOIDING CIRCUMVENTION OF THE INDIVIDUAL CONTRIBUTION LIMITS.

A. The Aggregate Limits Are No Longer Needed Because "Fully Disclosed" Means Something Different Now Than in 1974.

In 1974, Congress felt that disclosure, using the means available at the time, was insufficient to prevent circumvention of the individual contribution limit. *Buckley*, 424 U.S. at 28 ("Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed.").

In the technology of 1974, that may have been true, when "fully disclosed" meant something different to Congress – reports were filed on paper

and available only in a few offices.[16] "Fully disclosed," in 1974, meant buried in a mountain of paper filings. Absent any easy alternative to examining contribution reports, individually or in combination, Congress might have felt that the burden of an aggregate limit was justified by a need to protect the contribution limit.

Today, there are effective and efficient public and private alternatives, all designed to disclose and publicize any evasions of the contribution limit. The Justice Department, the media, and private organizations all use these technologies to monitor, in real-time, campaigns and donors, and release the results on the Internet free of charge, in formats expressly designed to be used by relatively unsophisticated analysts and observers. "Fully disclosed," *Buckley*, 424 U.S. at 28, is different today. The difference demonstrates that aggregate limits are no longer tailored to the problem Congress was addressing.

1. In 1974, Information About Candidates and Donors Was Not Easily Accessible.

Forty years ago, there was no Internet, political parties and their candidates were the only way most Americans experienced political campaigns, and Walter Cronkite and his media colleagues spoke as one of the few authoritative sources of news and commentary. Citizens could not

---

[16] Fed. Election Comm'n, *First Ten Years Report* (1985) ("First Ten Years"), at 9, *available at* http://fec.gov/pdf/firsttenyearsreport.pdf.

independently evaluate corruption in politics, especially that not covered in the news media. Perhaps as a result, "no candidate was ever prosecuted for violating federal campaign-finance law" from 1925 until the passage of the Federal Election Campaign Act ("FECA")[17] in 1971.[18]

The 1971 FECA was the first federal campaign finance scheme to impose a relatively centralized administrative framework and to require full reporting of political spending.[19] FECA required disclosure of all contributions and expenditures exceeding one hundred dollars.[20] Monitoring was entrusted to the Clerk of the House, the Secretary of the Senate, and the General Accounting Office.[21]

The 1972 election generated "shock waves of momentous revelations" concerning abuses by the Nixon Presidential campaign.[22] Investigations uncovered "illegal and improper" campaign practices and financing.[23]

---

[17] Federal Election Campaign Act of 1971, 92 Pub. L. No. 225, 86 STAT. 3 (1972).

[18] James L. Regens & Ronald Keith Gaddie, THE ECONOMIC REALITIES OF POLITICAL REFORM: ELECTIONS & THE U.S. SENATE 15 (1995).

[19] First Ten Years, *supra* note 16, at 1.

[20] *Id.* at 1-2.

[21] *Id.* at 2.

[22] *Buckley* v. *Valeo*, 519 F.2d 821, 835 (D.C. Cir. 1975) (en banc), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

[23] S. SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, FINAL REPORT, S. REP. NO. 93-981, at xxiii (1974).

Congress reacted. "The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act[24] was the problem of corruption of elected representatives through the creation of political debts. The importance of the governmental interest in preventing this occurrence has never been doubted." *Federal Election Commission* v. *National Right to Work Committee*, 459 U.S. 197, 208 (1982) (quoting *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788, n.26 (1978)).

Congress established the Federal Election Commission and restricted the amount an individual could directly give a candidate—capping it at $1,000 per candidate, in the 1974 amendments to FECA.[25] To provide the new agency with the ability to enforce the individual contribution limit, the 1974 FECA Amendments imposed a maximum limit of $25,000 on all contributions by an individual to candidates, PACs, and national, state and local political parties throughout each annual election cycle.[26] This is the genesis of the "aggregate limits" at issue in this case.[27] *Buckley*, 424 U.S. at 38 ("The over-all $25,000

---

[24] *See* Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070 (1925).

[25] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

[26] *Buckley*, 424 U.S. at 38 ("[T]his quite modest restraint . . . serves to prevent evasion of the $1,000 contribution limitation . . . .").

[27] The Bipartisan Campaign Finance Reform Act (BCRA) of 2002 replaced the aggregate limit at issue in

ceiling does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support. . . . The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid.").

One of the challenges hampering FECA's usefulness as a corruption deterrent was that, as a practical matter, the information about campaign contributions was inaccessible to the public. Reports were filed on paper; there was no alternative. "By the end of 1984, the [FEC Public Records] office had made public 5.59 million pages of documents."[28]

Disclosure in 1974 meant a civil servant retrieved an index card or paper filing from a filing cabinet.[29] The FEC admitted that analysis of those filings was even worse: "The first indexes compiled manually by the FEC staff in 1975 are primitive when compared to the variety of FEC computer indexes now available [in 1985]."[30]

Those computer indexes were available only in press releases and a few state offices;[31] to get the actual filings and any non-indexed records, the

---

Buckley with a new, split set of aggregate limits. 2 U.S.C. § 441a(a)(3) (2012).

[28] First Ten Years, *supra* note 166, at 9.

[29] *Id.*, at 9; Kathleen Sullivan, Comment, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 174 (2010).

[30] First Ten Years, *supra* note 16, at 9.

[31] *Id.*

public had to request assistance from the FEC's Public Records Office.[32] The "5.59 million pages of documents" the FEC reported it made available by 1985 were, essentially, unavailable to the average person seeking information.[33] Public disclosure was consequentially quite limited.[34]

In theory, at least, a wrongdoer could gamble that the information would not be accessible on a timely basis. This Court took note:

> And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the

---

[32] *Id.* ("In 1984, the [FEC] Public Records Office served 17,240 people and received 13,183 telephone inquiries.").

[33] *Id.*

[34] Following the money in Alabama politics might soon get a whole lot easier. Officials of the Alabama Secretary of State's office say they'll launch a searchable online database of campaign donations by the end of May — replacing the office's old system of paper filings and scanned-in documents. State officials say the changes should make it easier for average voters to figure out who's accepting money from whom." Tim Lockette, *Alabama Campaign Finance Reports Soon to Go Online*, Anniston Star (May 4, 2013), http://www.annistonstar.com/view/full_story/22472052/article-Alabama-campaign-finance-reports-soon-to-go-online?instance=home_news.

> identities of the contributors and the amounts of their contributions are **fully disclosed.**

Buckley v. *Valeo*, 424 U.S. 1, at 28 (1976) (emphasis added) (footnote omitted).

This is the context for the enactment of the aggregate limit as an anti-circumvention device: for both government and private observers in 1974, even full disclosure was not robust enough to monitor evasions of the individual contribution limit. *Id.*

2. Today, Information About Candidates and Donors Is Readily Available.

Today, information about candidates, parties, and campaign contributors is widely available through the Internet.[35] Disclosure reports filed by political committees are now available on the FEC's website within 48 hours; reports filed electronically are available "almost instantaneously."[36] Bloggers and social media serve as the principal means of communicating information to a significant segment

---

[35] *See, inter alia*, FED. ELECTION COMM'N, *Detailed Files About Candidates, Parties and Other Committees: Files By Election Cycle*, http://www.FEC.gov/disclosure.shtml (last visited May 8, 2013); CENTER FOR RESPONSIVE POLITICS, OPENSECRETS.ORG, http://www.OpenSecrets.org (last visited May 8, 2013); Tampa Bay Times, POLITIFACT, http://www.PolitiFact.com (last visited May 8, 2013).

[36] FED. ELECTION COMM'N, *Quick Answers to Disclosure Questions*, http://www.fec.gov/ans/answers_disclosure.shtml (last visited Apr. 8, 2013).

of the American electorate (as they do around the world).[37]

In addition, the development of free, on-line disclosure reports and cumulative databases puts previously-inaccessible information at the fingertips of even the least sophisticated analysts.[38] For example, the FEC maintains a free on-line database of election contributions, often reported within hours of the contribution.[39] The FEC makes available free data downloads for further data mining.[40] The Department of Justice uses the FEC database as its primary research tool to uncover instances of campaign contribution abuse.[41]

---

[37] Katie Denshaw, "Social media becoming crucial political tool," *The Philadelphia Inquirer*, April 26, 2013, http://articles.philly.com/2013-04-06/news/38329744_1_social-media-president-obama-mitt-romney; Maureen ODanu, *Social Media Becoming Major News Source for Journalists*, Technorati (May 18, 2011), http://www.technorati.com/social-media/article/social-media-becoming-major-news-source.

[38] *See, e.g.*, FED. ELECTION COMM'N, PERFORMANCE AND ACCOUNTABILITY REPORT FOR FY 2012 14-15 (Nov. 15, 2012), http://www.fec.gov/pages/budget/fy2012/FEC_PAR_FY_2012-Final.pdf (noting that the "Campaign Finance Disclosure Portal" is designed to "simplify access to the wide range of data available on the agency's web site" by incorporating "a variety of search tools that will help users make the best use of the Commission's data sources," and the "Candidate and Committee Viewer" that allows "users to analyze specific transactions in a customizable way").

[39] *See* FED. ELECTION COMM'N, *Campaign Finance Disclosure Portal*, http://www.fec.gov/pindex.shtml.

[40] *See, supra* note 33.

[41] Raman Statement, *supra* note 16, at 2.

Perhaps more important, however, is the development of private entities' searchable systems of contribution disclosure and analysis. The Center for Responsive Politics, for example, maintains the web site OpenSecrets.org, which provides a "Politicians and Elections" portal, http://www.opensecrets.org/elections/, with searchable databases of Presidential, Congressional and party contributions, and cross-links that data on such topics as "earmarks,"[42] personal finances,[43] and past elections:[44]

---

[42] Center for Responsive Politics, OpenSecrets.org, http://www.opensecrets.org/earmarks/index.php (last visited May 8, 2013) ("This database in large part seeks to detail how the recipients of federal earmarks interact with the federal government through lobbying efforts and campaign contributions. Readers may now, for example, determine the degree to which people and political action committees associated with a specific company or organization have donated money to a congressman responsible for giving that company or organization an earmark.").

[43] Center for Responsive Politics, *Politicians & Elections*, OpenSecrets.org, http://www.opensecrets.org/elections (last visited May 8, 2013) (description of "Personal Finances" database: "You can also see how much money elected and appointed officials have invested in industries they regulate and how they might stand to benefit personally from decisions your government makes. This is the Web's only searchable database of officials' personal financial reports, which are filed annually and are notoriously difficult to analyze.").

[44] *Id.* (description of "Historical Elections" database: "This section gives historical context to OpenSecrets.org's unparalleled campaign finance data, illuminating trends over time in fundraising and spending—the most influential

> There are a million stories to be found on the OpenSecrets website about the interaction between money and politics. But what's the bottom line and what are the most important – and interesting – trends from the last election? That's what you'll find here in the Big Picture.
>
> Have a look at the menus on the left side of the page and start clicking away. You'll find answers to basic questions about the role that money plays in our elections. You may also find answers to questions you never thought to ask. And if the Big Picture isn't enough, there are tens of thousands of other pages here on OpenSecrets that will take you as deep as you want to go.[45]

Part of this expansion of public access is the corollary expanding concept of "opposition research," which covers candidates and campaigns closely, awaiting any missteps that can yield political value. A number of organizations now conduct opposition research and post the results on the Internet, in some cases, requesting aid from the general public using modern technology.[46] Some of these private

---

industries, the biggest donors, the cost of winning a seat in Congress and so much more.").

[45] Center for Responsive Politics, *The Money Behind the Elections*, OpenSecrets.org, http://www.opensecrets.org/bigpicture/index.php (last visited May 8, 2013).

[46] *See, e.g.*, American Bridge 21st Century. "American Bridge 21st Century is a progressive research and communications organization committed to holding Republicans accountable for their words and actions and

recordings can change a campaign. "One of the most influential figures in the 2012 election, the bartender who secretly filmed [former Presidential candidate Mitt] Romney at a private fundraiser in Boca Raton, Fla., last May had been anonymous until now."[47]

The result of this massive public access system is a brutally-efficient political environment. Private organizations, not registered with or regulated by the FEC, serve as opposition researchers. "Fact-checkers" at major and minor publications stand ready to attack, and "reform" organizations promote limits on speech that would have shocked Norman Rockwell.

Campaign finance disclosure in a world of modern information technology empowers voters to follow contributions and judge for themselves whether the recipients have their best interests at heart.[48] Modern technology has reduced the amount of time between the filing of a disclosure statement and its delivery in a central depository easily

---

helping you ascertain when Republican candidates are pretending to be something they're not." *Who We Are*, American Bridge 21st Century, http://www.americanbridgepac.org/about (last visited May 8, 2013).

[47] Rachel Weiner, *Scott Prouty Reveals Himself As Man Who Shot '47 Percent' Video*, Wash. Post (Mar. 13, 2013, 8:19 PM), http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/13/scott-prouty-reveals-himself-as-man-who-shot-47-percent-video/.

[48] Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326 (1998) ("The rise of instantaneous mass communication over the Internet has transformed the world that FECA faced in 1974.").

accessible to the public.[49] "The advances brought by the new technology provide agencies with an efficient and effective means of sorting, auditing and retrieving campaign finance information, offer the public virtually immediate access to the data, in both raw and summary formats, and enable campaigns to ensure error-free reporting along with performing other campaign management functions."[50]

Large donations will stand out in contribution disclosure filings.[51] Journalists, bloggers, and other interested parties make the public aware of the candidates' source of funds.[52] The recent news coverage of the passing of major political donor Bob Perry, for example, cited FEC, media and private

---

[49] *See, e.g.*, Samuel Issacharoff & Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1737 (1999) (Wisconsin put all campaign finance information online within twenty-four hours).

[50] Craig B. Holman & Robert Stern, *Campaign Money on the Information Superhighway: Electronic Filing and Disclosure of Campaign Finance Reports*, CENTER FOR GOVERNMENTAL STUDIES (1999), *available at* http://www.policyarchive.org/handle/10207/bitstreams/225.pdf.

[51] Tom Donnelly, *Candidate Venture Capital*, 80 U. CIN. L. REV. 753, 780 (2012) ("[O]ne might expect disclosure to work better here, where the few deep pocket supporters of an otherwise-destitute candidate are likely to stand out on a disclosure report. Therefore, if such a candidate manages to build a viable campaign, her deep pocket supporters are then likely to become a campaign issue - whether through related media reports or negative attack ads.").

[52] *See, e.g.*, Billy Hallowell, *Meet the 5 Biggest Donors to the Obama & Romney Campaigns*, THE BLAZE (Oct. 19, 2012), http://www.theblaze.com/stories/2012/10/19/meet-the-5-biggest-donors-to-the-obama-romney-campaigns.

sources: "Since 2004, Mr. Perry had given a total of at least $45 million in federal contribution – excluding direct donations to candidates, according to Federal Election Commission records, a 2012 [Associated Press] analysis, and figures from the Center for Responsive Politics."[53]

In the past, this Court has ignored the impact of high-speed Internet communication on FECA's disclosure regime when examining the government's interest in combating corruption.[54] Yet, only three years ago, the Court predicted that these new media outlets would have an effect on public discourse. *Citizens United*, 558 U.S. at 364. Given the prophylactic reforms enacted by Congress,[55] the presence of the FEC's on-line resources, and the legions of available private researchers, analysts and advocates, the environment facing a would-be miscreant seeking to evade the contribution limits is significantly different than in 1974.

The Court in *Buckley* upheld the aggregate limits because "disclosure was only a partial measure, ... even when the identities of the contributors and the amounts of their contributions

---

[53] Paul J. Weber, *Perry remembered as titan of spending*, Wash. Times, Apr. 16, 2013, at A6.

[54] *See Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 408 (2000) ("Among the facts the Court declines to take into account is the emergence of cyberspace communication by which political contributions can be reported almost simultaneously with payment.") (Kennedy, J., dissenting).

[55] *See, e.g.*, Brief on the Merits for Appellant Republican National Committee, at 26-43 (describing various Congressional actions since 1974).

are fully disclosed." 424 U.S. at 28. Given the different environment today, "fully disclosed" means something different. "Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights." *Citizens United*, 558 U.S. at 364.

Even if the aggregate limits were justified in 1974, the environment has changed. Although the government interests the aggregate limits were intended to protect may not have changed, those limits themselves are no longer narrowly tailored to the interests. They should be struck down.

B. The New Freedom to Make "Independent Expenditures" Has Removed the Major Incentive to Circumvent the Individual Limits.

The other major change from 1974 is the development of alternative methods for individuals to speak during political campaigns. Prior to *Citizens United*, it was difficult for individuals to speak before an election:

> The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application."

Citizens United, 558 U.S. at 324 (quoting *Connally* v. *Gen. Constr. Co.*, 269 U. S. 385, 391 (1926)).

Now, after *Citizens United*, speakers can make unlimited independent expenditures supporting, opposing or discussing the relative merits of candidates. "In other words, as long as a corporation or other entity spends money for political speech that is truly independent of the candidate or campaign that it supports, it may spend as much money as it wishes."[56]

The Court has spoken often on the need to avoid chilling speech and to protect speakers' choice of mechanisms. "The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988); *see also Citizens United*, 558 U.S. at 326. "[I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction." *FEC* v. *Mass. Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986).

Those alternative means are readily available to cautious donors now. These lawful, compliant expenditures can be made by one speaker or in conjunction with others. *SpeechNow.org* v. *FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (applying exacting scrutiny to federal laws imposing disclosure and organizational requirements).

---

[56] Raman Statement, *supra* note 11, at 3.

"Dark money"[57] is a new, and in light of the First Amendment issues involved, misleading shorthand phrase for funds lawfully contributed to advocacy where the identity of the donor is not required to be disclosed – but the phrase demonstrates exactly the opposite of the intention of the FEC campaign finance disclosure regime. The proliferation of "dark money" in the current political environment is in large part due to nonprofit organizations that are not required to disclose their donors—particularly Internal Revenue Code Section 501(c)(4)-qualified "social welfare" organizations. In the 2012 election, these groups lawfully spent $400 million[58] (out of total 2012 campaign spending of more than $6 billion).[59]

Since *Mass. Citizens for Life, Inc.*, 479 U.S. at 263-65, and *FEC* v. *Beaumont*, 539 U.S. 146, 163 (2003), Section 501(c)(4) organizations generally operate outside the scope of FEC restrictions, can raise unlimited amounts of contributions, and are

---

[57] Bill Allison, *Daily Disclosures*, Sunlight Foundation (Oct. 18, 2013, 12:43 PM), http://sunlightfoundation.com/blog/2010/10/18/daily-disclosures-10/.

[58] Paul Blumenthal, *'Dark Money' in 2012 Election Tops $400 Million*, Huffington Post (Nov. 2, 2012), http://www.huffingtonpost.com/2012/11/02/dark-money-2012-election-400-million_n_2065689.html.

[59] Center for Responsive Politics, *2012 Spending Will Reach $6 Billion*, Open Secrets Blog (Oct. 31, 2012, 2:33 PM) http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html.

not required to disclose their donors.[60] President Obama's campaign committee was re-launched after the 2012 election as a Section 501(c)(4) organization, Organizing for America, and has been criticized for perpetuating dark money and a lack of transparency.[61]

A Section 501(c)(4) organization can engage in "independent expenditure" political activities as long as electioneering is not the organization's primary purpose.[62] This has typically been interpreted to mean that the Section 501(c)(4) organization cannot spend more than fifty percent of its resources on campaign-related activity, but this level allows the organization substantial flexibility to promote or oppose political candidates.[63]

---

[60] I.R.C. § 6104(d)(3); Anthony J. Gaughan, *The Futility of Contribution Limits in the Age of Super PACs*, 60 DRAKE L. REV. 755, 782-83 (2012).

[61] Alana Goodman, *Lobbying for Action: OFA Registers as lobbyist in NY despite anti-lobbyist positions*, WASH. FREE BEACON (Apr. 12, 2013), http://freebeacon.com/lobbying-for-action/; Fred Wertheimer, *A Challenge to President Obama's New 501(c)(4) Group*, Huffington Post (Jan. 29, 2013), http://www.huffingtonpost.com/fred-wertheimer/a-challenge-to-president-_b_2569105.html.

[62] John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, Internal Revenue Service, at L-3 (2003), *available at* http://www.irs.gov/pub/irs-tege/eotopicl03.pdf.

[63] *See, e.g.*, Joseph M. Birkenstock, *Three Can Keep a Secret, If Two of Them Are Dead: A Thought Experiment Around Compelled Public Disclosure of "Anonymous" Political Expenditures*, 27 J.L. & POLITICS 609, 612 n.8 (2012).

In addition, a prospective donor could make unlimited contributions to FEC-regulated "independent expenditure-only" political committees (known informally as SuperPACs).[64] Like Section 501(c)(4) organizations, SuperPACs may receive contributions without limits (and without counting against a donor's aggregate limit), and can make unlimited independent expenditures. *SpeechNow.org* v. *FEC*, 599 F.3d 686, 695-96 (D.C. Cir. 2010) (en banc). Unlike a Section 501(c)(4) organization, all contributions to a SuperPAC are disclosed. *Id.* at 697-98.

The Department of Justice acknowledges that "[t]hese developments are having a profound effect on our ability effectively to enforce the campaign finance laws." Raman Statement, *supra* note 11, at 2.

> The increasing use of Super PACs and the types of [Internal Revenue Code Section] 501(c) organizations described above impacts transparency and changes the kinds of criminal cases the Department can bring under our campaign finance laws. We anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be

---

[64] *See, e.g.*, FEC Advisory Opinion 2010-11 (Commonsense Ten), at pp. 2-3, July 22, 2010, http://saos.nictusa.com/aodocs/AO%202010-11.pdf.

> criminally prosecuted. Instead, they are likely to simply make unlimited contributions to Super PACs or 501(c)s.

Id. at 3.

The effect of that freedom to speak and associate during election campaigns is still unclear, with some claiming impending doom,[65] and others pointing to the 2012 elections as evidence that the use of more speech did not affect one of the most contentious elections in recent history.[66]

The ability to donate large sums to a Section 501(c)(4) organization or a SuperPAC means that

---

[65] E.J. Dionne, Jr., Opinion, *Fighting big money with big money*, Wash. Post (Mar. 27, 2013) ("But imagine that you also believe the Supreme Court's *Citizens United* decision was a disaster for representative government because a narrow majority broke with long precedent and tore down the barriers to corporate money in politics."), http://www.washingtonpost.com/opinions/ej-dionne-michael-bloomberg-and-fighting-money-with-money/2013/03/27/54fa52d4-96f5-11e2-b68f-dc5c4b47e519_story.html.

[66] Ezra Klein, *We got way too excited over money in the 2012 elections*, Wash. Post (May 6, 2013) ("But it's hard to look at the 2012 election, with its record fundraising and the flood of super PACs and all the rest of it, and come away really persuaded that money was a decisive player."), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/06/we-got-way-too-excited-over-money-in-the-2012-elections/; Tim Dickinson, *How President Obama Won A Second Term*, Rolling Stone (Nov. 23, 2012) (quoting political analyst James Carville: "Never have so few spent so much to accomplish so little. We all freak out that the money in politics is going to change everything. As it turned out, it really didn't change much."), http://www.rollingstone.com/politics/news/how-president-obama-won-a-second-term-20121123#ixzz2QdnM5cjL.

those seeking to contribute in excess of the aggregate limits have the ability to do so, entirely in compliance with the laws. The contributions, however, cannot be to the candidates the donors want to elect or political parties they want to support; they must be made to groups independent of the candidates or parties.

In other words, where aggregate limits might have been necessary in the past to prevent conduit contributions, now there is far less incentive to use conduits. We will see "fewer cases of conduit contributions" because donors "no longer need to attempt to do so." Raman Statement, *supra* note 11, at 3. Thus, there is no substantial connection between the aggregate limits and the expressed governmental interest supporting them. In such cases, even a slight burden imposed by the aggregate limits undercuts their constitutionality in the face of the highly-protected associational rights at issue here.

C. The Major Effect of the Aggregate Limits in a Smartphone Era Is an Impermissible "Leveling" of Speech.

The aggregate limits impose a constitutionally impermissible burden on speech by restricting the speech of some to enhance the relative voice of others.[67] This Court has "repeatedly rejected the

---

[67] *See Citizens United*, 558 U.S. at 340-41 ("By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and

argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech."[68]

That there are relatively few of those on whom the burden falls does not lessen the First Amendment impact. "References to massive corporate treasuries should not mask the real operation of this law." *Citizens United*, 558 U.S. at 355.

In today's environment, the aggregate limits sweep both too broadly and not enough; in fact, they are counter-productive. They restrict those persons who are compliant with the individual contribution limits, such as Appellant McCutcheon, and exclude those who want to give more than the aggregate limits would permit, such as the late Bob Perry, who could spend $45 million without counting political contributions.[69] And they end up incentivizing potential donors to donate in ways that are both unlimited and not disclosed, undermining the rationale for the current campaign finance laws.

In reality, the aggregate limits will fall only on a very small sub-class of persons: those who want

---

respect for the speaker's voice. The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."), 349-50; *Ariz. Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2821 (2011).

[68] *Arizona Free Enterprise*, 131 S. Ct. at 2825-26 ("'Leveling the playing field' can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech.").

[69] *See* Weber, *supra* note 53.

to support candidates through disclosed contributions rather than independent expenditures. Thus, the only persons who will be affected by the aggregate limits are those who wish to contribute directly to candidates and to be disclosed as having done so. Given the ubiquitous nature of campaign finance reporting and analysis described above, this small group will likely be those who comply with the law (or perhaps are ignorant of the realities of today's political environment).

A perverse result of the current brutally-efficient disclosure regime is that today's on-line services benefit principally those who wish to use the information to attack an opponent's supporters.[70] The aggregate limits, however, expose these donors to intense public scrutiny while at the same time limiting their ability to counter the criticism that invariably arises. The Court can assume that these donors, like many before them, will either not speak or will use other means to protect themselves.

The effect of limiting the aggregate limits to this small group of lawful and careful donors is to shift contributions away from candidates and parties, and into the independent expenditure organizations. Those who suffer from this shift will likely be innovative and distinctive candidates who

---

[70] "Activists hope to use this information to publicly browbeat their opponents and eliminate their participation in public policy debates." Paul Atkins, *SEC Should Reject Partisan Ploy: Opposing View*, U.S.A. Today, May 1, 2013, *available at* http://www.usatoday.com/story/opinion/2013/05/01/sec-political-donations-disclosure-rule-editorials-debates/2128009/.

don't otherwise enjoy the support of the mainstream parties. *McConnell v. FEC,* 540 U.S. 93, 249-50 (2003) (Scalia, J., concurring in part and dissenting in part) ("[*A*]*ny* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.").

In House of Representatives elections from 1964 through 2012, general election success rates for incumbents were at least 85%, and usually much higher.[71] Incumbents normally begin their campaigns with a large base of support, enjoying "such advantages as name recognition, press coverage, free mailings to their constituents, and a free staff."[72]

Because only a small percentage of the electorate actually pays attention to the earliest days of a political race, challengers and third-party candidates typically have no choice but to rely on donations from a small group of wealthy, politically-motivated contributors.[73] The need for campaign cash is most apparent early in a campaign's life cycle.[74] If aggregate limits shift funding from these challengers to independent expenditures, there may

---

[71] Center for Responsive Politics, *Reelection Rates Over the Years*, OpenSecrets.org, http://www.opensecrets.org/bigpicture/reelect.php (last visited May 8, 2013).

[72] *See* Yasmin Dawood, *Electoral Fairness and the Law of Democracy*, 62 U. TORONTO L.J. 499, 547-48 (2012).

[73] Tom Donnelly, *Candidate Venture Capital*, 80 U. CIN. L. REV. 753, 761-63 (2012).

[74] *Id.* at 764, 772-773 ("[M]ost challengers receive seed money from a handful of individual contributors.").

be no innovative, upstart campaigns for the independent expenditures to support.

Thus, a doctrine designed to promote a larger number of smaller contributions to candidates will end up with the opposite effect: incentivizing politically-active persons to spend their political dollars in other ways, which do not include the disclosure deemed essential to the campaign finance system. Thus, the aggregate limits exacerbate the "covert speech" problem identified in *Shrink Mo. Gov't PAC,* 528 U.S. at 406 (Kennedy, J., dissenting), and run counter to their expressed goals. They are not narrowly-tailored to their identified governmental interests.

Advances in technology have given the public access to information that can be used to reveal patterns of corruption where they exist. *Citizens United* and its progeny have given contributors multiple avenues to speak, undercutting the incentive to circumvent the individual contribution limits. And the aggregate limits function more as an impermissible "leveling" mechanism in the field of speech than as an anti-circumvention tool. In this light, the aggregate limits may no longer be a "corollary" to the individual contribution limits. The law is "extraordinarily ill-fitted to that goal," and "other means to protect those valid interests are available."[75] Therefore, whether or not they originally met the standard of review, today the aggregate limits fail to meet that standard.

---

[75] *Bullock* v. *Carter*, 405 U.S. 134, 146 (1972).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Cause of Action Institute respectfully requests this Court to reverse the decision below.

BARNABY W. ZALL
Counsel of Record
Weinberg, Jacobs
& Tolani, LLP
7018 Tilden Lane
Rockville, MD 20852
(301) 231-6943
bzall@bzall.com

Daniel Z. Epstein
Hallee Morgan
Justin Meyers
Marie Connelly
Robyn Burrows
Karen Groen
CAUSE OF ACTION
INSTITUTE
1919 Pennsylvania Ave.,
N.W.
Washington, D.C. 20006

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

FILED
MAY 13 2013
OFFICE OF THE CLERK

No. 12-536

In the
Supreme Court of the United States

SHAUN MCCUTCHEON, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF APPELLANTS

ALLEN DICKERSON
Counsel of Record
ZAC MORGAN
DAVID SILVERS
ANNE MARIE MACKIN
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
adickerson@campaignfreedom.org
(703) 894-6800

May 13, 2013 — *Counsel for Amicus Curiae*

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. This Court has consistently applied a rigorous standard in reviewing contribution limits, but has not consistently defined that standard 4

II. In applying this standard, the Court has implied that courts should defer to legislatures when reviewing contribution limits 5

III. Where, as here, the government has neither justified its restriction nor demonstrated that it is closely drawn, deference to Congress is inconsistent with the required rigorous review of the challenged statute 7

IV. Moreover, if "rigorous standard of review" is to have meaning, even when presented with a legislative record, courts must undertake a probing analysis of that record rather than simply deferring to the legislature's proffered or conclusory findings 11

A. Deference to legislative determinations, especially where no record justifies doing so, risks incumbent self-protection 12

B. Deference to legislative judgments may also rely upon a false premise: that legislators actually possess expertise concerning the regulation of campaign finance 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Buckley v. Valeo,
424 U.S. 1 (1976) ..... *passim*

Citizens Against Rent Control v. City of Berkeley,
454 U.S. 290 (1981) 4, 7, 11

Davis v. FEC,
554 U.S. 724 (2008) 14

FEC v. Wisc. Right to Life, Inc.,
551 U.S. 449 (2007) 10

Greater New Orleans Broadcasting Ass'n v. United States,
527 U.S. 173 (1999) 7

McConnell v. FEC,
540 U.S. 93 (2003) ..... *passim*

Nixon v. Shrink Mo. Gov't PAC,
528 U.S. 377 (2000) ..... *passim*

Randall v. Sorrell,
548 U.S. 230 (2006) ..... *passim*

Ognibene v. Parkes,
671 F.3d 174 (2d Cir. 2011) 6

Preston v. Leake,
660 F.3d 726 (4th Cir. 2011) 6

Libertarian Nat'l Comm. v. FEC,
No. 1:11-cv-00562, 2013 U.S. Dist. LEXIS 36729 (D.D.C. March 18, 2013) 5, 10

Wagner v. FEC,
854 F.Supp. 2d 83 (D.D.C. 2012) 6

Statutes and Regulations

2 U.S.C. § 441a(a) 2, 4

11 C.F.R. § 110.5 4

Other Authorities

147 Cong. Rec. S. 2540 14

147 Cong. Rec. S. 2542 14

147 Cong. Rec. S. 3028 9

147 Cong. Rec. S. 3090 9

148 Cong. Rec. S. 2131 14

148 Cong. Rec. S. 2132 14

148 Cong. Rec. S. 2154 9

Robert F. Bauer,
When 'The Pols Make the Calls': McConnell's *Theory of Judicial Deference in the Twilight of* Buckley, 153 U. PENN. L. REV. 5 (2004) 13

Lillian BeVier,
Not Senator Buckley's First Amendment,
3 ELECTION L.J. 127 (2004) 16

Bradley A. Smith,
McConnell v. FEC*: Ideology Trumps Reality*,
3 ELECTION L.J. 345 (2004) 15

Jennifer Yachinin,
House Admin Requests BCRA Symposium,
ROLL CALL, Oct. 20, 2003 15

Woe Is Them, THE WALL STREET JOURNAL,
Feb. 20, 2003 at A12 16

INTEREST OF *AMICUS CURIAE*[1]

Founded in 2005 by former Federal Election Commission Chairman Bradley Smith, the Center for Competitive Politics ("CCP") is a 501(c)(3) organization that seeks to educate the public about the effects of money in politics, and the benefits of increased freedom and competition in the electoral process. CCP works to defend the First Amendment rights of speech, assembly, and petition through scholarly research and both state and federal litigation.

Amicus has participated in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC,* 558 U.S. 310 (2010) and *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010). *Amicus* also represents the plaintiff-appellant in *James v. FEC*, No. 12-683, a challenge to 2 U.S.C. §441a(a)'s limitation on the contribution of funds directly to candidates that may, under the statute, lawfully be contributed to parties and political committees.

---

[1] No party has contributed, monetarily or otherwise, to the preparation or filing of this brief, which was authored entirely by counsel for *amicus*. Copies of the consents of all parties to the filing of this brief are filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The district court's decision to uphold the aggregate individual contribution limits of the Bipartisan Campaign Reform Act ("BCRA"), codified at 2 U.S.C. § 441a(a), did not reflect the exacting review demanded by the First Amendment interests implicated here. Even if the court were correct in declining to apply strict scrutiny, contribution limits must still be "closely drawn to match a sufficiently important interest." *McConnell v. FEC,* 540 U.S. 93, 136 (2003). While noting this standard, the district court failed to adequately apply it.

This error stems, in part, from confusion over the proper standard of review for contribution limits. In particular, the tailoring prong of such analysis has often been replaced by deference to legislators' "particular expertise" regarding "the cost and nature of running for office." *Randall v. Sorrell,* 548 U.S. 230, 248 (quoting *McConnell,* 540 U.S. at 137).

Such deference is mistaken in this case, and should be reconsidered generally. Where, as here, the Congress failed to generate any substantive record to justify its legislative approach, the rationale for judicial deference collapses. Moreover, such deference substantially increases the likelihood that legislative action will disproportionately serve the interests of incumbent politicians. Finally, the premise undergirding deference to legislative pronouncements in this area – that legislators actually possess expertise in the area of campaign finance – may be fundamentally mistaken.

Contribution limits implicate "the most fundamental" First Amendment interests. *Buckley v.*

Valeo, 424 U.S. 1, 14 (1976). This Court has consequently demanded that they be subjected to heightened judicial scrutiny. Deference to the Congress, especially in the absence of any relevant legislative record, is inconsistent with that requirement and fails to adequately safeguard the First Amendment's guarantees.

ARGUMENT

I. This Court has consistently applied a rigorous standard in reviewing contribution limits, but has not consistently defined that standard.

Appellants have brought a challenge to, *inter alia*, the aggregate individual contribution limits of the Bipartisan Campaign Reform Act ("BCRA"), codified at 2 U.S.C. § 441a(a); 11 C.F.R. 110.5 (2013). The district court's decision to uphold the aggregate individual limit did not reflect the exacting review demanded by the First Amendment interests implicated here. But that error can be explained, in part, by the lack of clear guidance from this Court, which can be corrected here.

Since *Buckley v. Valeo*, this Court has required that contribution limits must be "closely drawn to avoid unnecessary abridgement of associational freedoms." 424 U.S. 1, 25 (1976) (internal citations omitted). Consistently, this Court has determined that a "rigorous standard of review" must be applied to determine if such limits are appropriately drawn. *Buckley*, 424 U.S. at 29.

However, the Court has not consistently defined the contours of this rigorous standard. At times, it has analyzed contribution limits under "exacting judicial scrutiny." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981). In other decisions, such as its consideration of the contribution limits imposed by the state of Missouri, it has applied "heightened judicial scrutiny." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000).

And other courts have "held that the standard to apply to contribution limits is akin to intermediate scrutiny." *Libertarian Nat'l Comm. v. FEC*, No. 1:11-cv-00562, 2013 U.S. Dist. LEXIS 36729, at *25 (D.D.C. March 18, 2013) (citing *SpeechNow.org v. FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010); *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010)).

What is clear is that there is a requirement of heightened scrutiny and, like strict scrutiny, the scrutiny applied to contribution limits proceeds in two steps. First, the government must show a sufficiently important governmental interest to justify infringements on the First Amendment. *Buckley*, 424 U.S. at 25. Second, it must choose means "closely drawn" to that interest. *Id.* But the tailoring prong of this analysis remains a source of confusion.

In *Shrink Missouri*, the Court itself recognized this lack of a uniform rule. In determining if a contribution limit is closely drawn, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislation will vary up or down with the novelty and plausibility of the justification raised." *Shrink*, 528 U.S. at 391.

II. In applying this standard, the Court has implied that courts should defer to legislatures when reviewing contribution limits.

The Court has held that, generally, proper application of this amorphous standard requires some "defer[ence] to the legislature[]." *Randall v.*

Sorrell, 548 U.S. 230, 248. Legislators have "particular expertise" regarding "the cost and nature of running for office." *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 137 (2003)). Given this perceived competency of legislative bodies, the Court has declined to wholly substitute its judgment for that of Congress or the state legislatures. Thus, "[t]he judiciary owes special deference to legislative determinations regarding campaign contribution restrictions." *Ognibene v. Parkes*, 671 F.3d 174, 182 (2d Cir. 2011).

In the contribution context, the lower courts have "emphasized that it is for the legislature—not the courts—to determine how to appropriately address corruption." *Wagner v. FEC*, 854 F. Supp. 2d 83, 92 (D.D.C. 2012). The Fourth Circuit Court of Appeals recently noted that deference to "important and...legitimate judgment[s]" is appropriate, "especially where corruption is the evil feared." *Preston v. Leake*, 660 F.3d 726, 736 (4th Cir. 2011) (internal citations and quotation marks omitted).

But this deference does not extinguish the tailoring required to satisfy heightened scrutiny. This Court has foresworn "accept[ing] mere conjecture as adequate to carry a First Amendment burden." *Shrink*, 528 U.S. at 392. The government may not prevail on the basis of hypothetical danger. "The Court's decisions involving associational freedoms establish that the right of association is a basic constitutional freedom...[which] lies at the foundation of a free society." *Buckley*, 424 U.S. at 25 (internal citations and quotations omitted). Indeed, even when dealing with speech lying further from the core of the First Amendment than political

speech, this Court has demanded that the government demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to some degree." *Greater New Orleans Broadcasting Ass'n. v. United States*, 527 U.S. 173, 188 (1999). Restricting First Amendment freedoms necessarily requires the government to concretely explain *why* it has the right to do so, and that its means for doing so are "closely drawn."

In *Citizens Against Rent Control*, Justice Marshall explained the requirements of heighted scrutiny. In order for the government to succeed, "the record...[must] disclose sufficient evidence to justify the conclusion that" contributions in excess of present limits would "undermine[] the confidence of the citizenry in government." *Citizens Against Rent Control*, 454 U.S. at 301 (Marshall, J., concurring). Without such evidence, the justification for deference to the legislature dissolves.

III. Where, as here, the government has neither justified its restriction nor demonstrated that it is closely drawn, deference to Congress is inconsistent with the required rigorous review of the challenged statute.

In this case, *no record exists*. Neither the lower court nor the FEC offered any evidence supporting the contention that the individual aggregate limits address either corruption or a credible threat of circumvention.

Indeed, the *McCutcheon* panel largely relied on the very sort of "mere conjecture" that the *Shrink*

Missouri Court rejected. The lower court presented a hypothetical scenario, whereby joint fundraising committees could serve as a means for corruption-by-conduit. *McCutcheon v. FEC*, No, 1:12-cv-01034, slip op. at 9 (D.D.C. Sept. 28, 2012). But the court itself noted that "it may seem unlikely that so many separate entities would willingly serve as conduits for a single contributor's interests." *McCutcheon* at 10. Despite its own skepticism, the lower court decided that because "it is not hard to imagine a situation where the parties implicitly agree to such a system," it was forced to uphold the individual aggregate limits. *Id.* This is precisely the constitutionality-by-conjecture approach that this Court's holdings have repeatedly disavowed.

Nor did the district court rely on a legislative record substantiating the alleged risks of corruption-by-conduit. Despite extensive research, *amicus* could locate no record regarding any of the Bipartisan Campaign Reform Act's aggregate limits. *Amicus* reviewed all references to "aggregate limits" and all permutations of the phrase that appear in the Congressional Record for the 107th Congress. This review included statements on the House and Senate floors, and all relevant committee material.

Based on this review of the public record, *amicus* submits that no member of Congress made any substantive representation as to the purpose of the aggregate limits. Indeed, most references to the aggregate limits in the Congressional Record consist of draft legislative text or statements which merely acknowledge the limits' existence. *See, e.g.*, 147 Cong. Rec. S. 3028; 147 Cong. Rec. S. 3090. The current individual aggregate limit emerged from a

compromise brokered by Senator Dianne Feinstein of California and then-Senator Fred Thompson of Tennessee. 148 Cong. Rec. S. 2154. Neither senator devoted any time on the record to an explanation of the anti-corruption or anti-circumvention rationale of an aggregate limit on individual contributions. *Id.* Nor did any committee take testimony or assemble evidence on this point.

It may be that Congress felt little need to substantiate the necessity of the aggregate limits in light of *Buckley*'s determination that aggregate limits are "no more than a corollary of the basic individual contribution limitation." *Buckley*, 424 U.S. at 38. But *Buckley*'s statement arose in a substantially different statutory context: in 1976, it was possible for an individual to circumvent FECA's $1,000-per-candidate contribution limit "by contributing up to $5,000 in unearmarked funds to as many [political] committees as he wished, which in turn could have re-contributed those funds to a particular candidate." McCutcheon Open. Br. at 4.

Moreover, *Buckley* upheld an overall cap on giving—not a system where the government both limits the total amount any individual may contribute *and* further directs that overall giving via caps on contributions to PACs, parties, and candidates. Under FECA, an individual could contribute $25,000 to candidates, $25,000 to committees, or a mixture of her choosing. That ability to divide aggregate contributions among entities of an individual contributor's choosing no longer exists, and Congress left no discussion on the record as to how BCRA's novel scheme fights corruption.

Ignoring these changes, and failing to cite to any legislative or judicial record, the district court asserts that "[i]t is not the judicial role to parse legislative judgment about what limits to impose." *McCutcheon* at 10 (internal citation omitted). In doing so, the lower court engages in no more than the application of a soft, rational basis review—not the rigorous, heightened scrutiny required by this Court's precedents. Leaving the lower court's ruling in place would implicitly overturn *Buckley*'s holding that contribution limits must be closely drawn. In fact, leaving *McCutcheon* undisturbed will permit the government to prevail by merely asserting constitutionality.[2]

In light of the "scant evidence" to support Congress's judgment, the lower court exercised an inappropriate level of deference. *See McConnell*, 540 U.S. at 232. Reliance upon the "mere conjecture"

---

[2] In another case presently before the D.C. District Court, the FEC claims that court committed clear error by certifying a question to the *en banc* Court of Appeals under the procedure established by 2 U.S.C. § 437(h). *See Libertarian Nat'l Comm. v. FEC*, No. 1:11-cv-00562, 2013 U.S. Dist. LEXIS 36729 (D.D.C. March 18, 2013). The FEC's argument rests on the notion that as-applied challenges threaten "the interest in maintaining clear, bright-line prophylactic rules." FEC Mot. to Alt. at 12. Moreover, the Commission argued that the district court's mere *consideration* of less-restrictive means, as part of a tailoring analysis under exacting scrutiny, was too similar to strict scrutiny, and consequently also clear error. FEC Mot. to Alt. at 16. But "a prophylaxis-upon-prophylaxis approach to regulating expression is not consistent with strict scrutiny." *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 479 (2007) (controlling opinion). Nor, we suggest, is it compatible with the exacting scrutiny demanded by this Court in the realm of contribution limitations.

that unlimited individual aggregate contributions to candidates may be harmful is not the "rigorous standard of review" demanded by *Buckley* and its progeny. This Court has regularly relied on a "record or legislative findings" to determine whether or not a contribution limit passes constitutional muster. *Citizens Against Rent Control*, 454 U.S. at 302 (Blackmun, J., concurring). While "[t]he quantum of empirical evidence needed [from such a record]...will vary," what has been presented to this Court is wholly "[in]adequate to carry a First Amendment burden." *Shrink*, 528 U.S. at 392. This Court's review of the individual aggregate contribution limit, like all contribution limits, must be rigorous and searching, and not simply an unconditional deference to a legislative decision made without evidence or deliberation.

IV. Moreover, if "rigorous standard of review" is to have meaning, even when presented with a legislative record, courts must undertake a probing analysis of that record rather than simply deferring to the legislature's proffered or conclusory findings.

Without a record, the district court nonetheless stated that it is "not the judicial role to parse legislative judgment about what [contribution] limits to impose." *McCutcheon* at 10 (*citing Randall*, 548 U.S. at 248 (internal citations and quotations omitted)). While this Court has "ordinarily...deferred to the legislature's determination of such matters," such deference to expertise must, in the context of

heightened scrutiny, have some basis. *Randall,* 548 U.S. at 248. Courts must demand evidence that the legislature's expertise was actually used, and also that it was directed toward a constitutionally-permissible end. An established record is clearly necessary to such an inquiry.

The absence of such a record poses two troubling possibilities. First, the legislature's "particular expertise" may have been used to protect incumbents, a danger that justices of this Court and members of the 107th Congress have explicitly recognized. Second, in the case of campaign finance law, compelling evidence suggests that many – perhaps most – legislators have no actual expertise.

Of course, these two options are not mutually exclusive. Some members of Congress may be conniving, and others ignorant.

A. Deference to legislative determinations, especially where no record justifies doing so, risks incumbent self-protection.

Members of Congress are returned to office on the basis of successful political campaigns, which "in the modern setting" necessarily "involve the expenditure of money." *Buckley*, 424 U.S. at 11. Thus, members of Congress have a particular self-interest in the regulation of campaign finance. This self-interest could conceivably lead legislators to design rules that protect their incumbency. As Robert Bauer, a noted campaign-finance attorney who served as General Counsel of Obama for America and as the President's White House Counsel, has written:

> The problem is not simply that, in a critique of their own involvement with political money, officeholders may be tempted to rig the game for their own purposes. There is also the fair possibility that, even if they do the best they can, their biases will taint, if not wholly disqualify, the effort.

Robert F. Bauer, *When 'The Pols Make the Calls': McConnell's Theory of Judicial Deference in the Twilight of* Buckley, 153 U. PENN. L. REV. 5, 18 (2004).

This bias poses a threat to First Amendment interests. As this Court recognized in *Randall,* the danger that contribution limits could prevent candidates from "amassing the resources necessary for effective advocacy," has a corollary. Because such limits are drafted by incumbents, they may "magnify the advantages of incumbency to the point where they put challengers to a significant disadvantage." *Randall*, 548 U.S. at 248 (citing *Buckley*, 424 U.S. at 21). Individual members of this Court have gone further. *McConnell*, 540 U.S. at 249 (Scalia, J., dissenting) ("as everyone knows, this is an area in which evenhandedness is not fairness...*any* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.") (emphasis in original); *Id.* at 306 (Kennedy, J., dissenting) ("Title I's entirety begins to look very much like an incumbency protection plan....The very nature of the restrictions imposed by these provisions makes one

all the more skeptical of the...explanation of the interests at stake.").

Such concerns are not misplaced. While no substantial legislative record justifies BCRA's aggregate contribution provisions, BCRA as a whole was heavily debated. Many senators made statements noting that the overall effect of the law would be to protect incumbents from electoral challenges. *See, e.g.*, 148 Cong. Rec. S. 2132 (Statement of Senator Rick Santorum: "If you do not think this is an incumbent protection plan, I guarantee you have not been listening."); 148 Cong. Rec. S. 2131 (Text of letter from Laura W. Murphy of the American Civil Liberties Union introduced into the record by Senator Mitch McConnell: "[BCRA will] protect incumbents....").

Indeed, a floor statement by Senator John McCain openly adopted a "defend the incumbents" rationale to justify the so-called Millionaire's Amendment struck down by this Court in *Davis v. FEC*, 554 U.S. 724 (2008). 147 Cong. Rec. S. 2540 (The amendment "addresses, in all candor, a concern that virtually any nonmillionaire Member of this body has"—namely, being challenged by a deep-pocketed citizen.) In response, Senator Chris Dodd demurred that "this is what I would call incumbency protection." 147 Cong. Rec. S. 2542.

The danger that legislators will protect their own jobs, intentionally or otherwise, is insufficient standing alone to invalidate campaign-finance regulations. But it is enough to show that legislative pronouncements must not be taken at face value.

B. Deference to legislative judgments may also rely upon a false premise: that legislators actually possess expertise concerning the regulation of campaign finance.

Deference to legislative expertise is inappropriate where there is little expertise to defer to. Members of Congress have often shown considerable ignorance of the nation's campaign finance laws. For example, in October 2003, less than one year after the effective date of BCRA, the House Administration Committee (which has jurisdiction over campaign finance laws) formally requested that the FEC provide training sessions for representatives. Jennifer Yachinin, *House Admin Requests BCRA Symposium*, ROLL CALL, Oct. 20, 2003. The committee's ranking minority member, who supported the request, was apparently unaware that BCRA had already gone into effect, "unwittingly demonstrat[ing] the need for such a seminar." *Id.*

Such ignorance is not surprising given that "members of Congress...do not actually manage their own campaigns and usually have little experience working in the party structure or with the types of citizen groups affect by...[BCRA]." Bradley A. Smith, McConnell v. FEC: *Ideology Trumps Reality*, 3 ELECTION L.J. 345, 349 (2004). As a result, most members "may actually have very little understanding of how provisions of the law might work" despite enthusiastically supporting it. *Id.* After teaching a "McCain-Feingold school" for Democrats, a party which overwhelmingly supported

BCRA,[3] Robert Bauer noted that the lessons "sometimes leave...[congressional] audiences in a state of complete shock." *Woe Is Them*, THE WALL STREET JOURNAL, Feb. 20, 2003 at A12.

Courts ought not, and consistent with exacting scrutiny cannot, presume legislative expertise absent a rigorous examination of a serious record. Further, if heightened scrutiny is to be meaningful, the Court's examination must do more than rely on self-interested assertions as truth and newspaper editorials as fact. *See* Lillian BeVier, *Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127 (2004); *see also McConnell* at 271 n. 3 (Thomas, J., concurring in part and dissenting in part) ("...the principal contents of Senator McCain's declaration are his complaints that several bills he supported were defeated...[t]he possibility that his favored policy outcomes lose due to lack of public support, or because the opponents of the amendment honestly believed it would do harm to the public, does not appear to be addressed.").

On this record and on these facts, there is "no alternative to the exercise of independent judicial judgment" concerning the individual aggregate limits. *Randall*, 548 U.S. at 249. But the point is broader. Regulation of campaign contributions implicates important First Amendment interests, and is consequently subject to exacting scrutiny. Such scrutiny requires that the means chosen be

---

[3] The Senate roll call for BCRA is available at: http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00054. The House roll call for BCRA is available at: http://clerk.house.gov/evs/2002/roll034.xml.

reasonably tailored to the ends desired. As the lower court's decision shows, over the years this Court's required level of scrutiny has become "rigorous" in theory, but wholly deferential in fact. Mere deference to legislatures, especially given the concerns outlined above, is inconsistent with the judiciary's duty to independently, and carefully, probe the record for evidence supporting legislative judgments.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the district court.

Dated: May 13, 2013

Respectfully Submitted,

ALLEN DICKERSON
Counsel of Record
CENTER FOR COMPETITIVE POLITICS
124 S. West St., Suite 201
Alexandria, Virginia 22314
adickerson@campaignfreedom.org
Telephone: (703) 894-6800

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 13 2013
OFFICE OF THE CLERK

No. 12-536

IN THE
Supreme Court of the United States

SHAUN MCCUTCHEON AND
REPUBLICAN NATIONAL COMMITTEE,
Appellants,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF *AMICUS CURIAE* OF THE COMMITTEE FOR JUSTICE IN SUPPORT OF APPELLANTS

CURT A. LEVEY
The Committee for Justice
722 12th Street, N.W.,
4th Floor
Washington, DC 20005
(202) 270-7748
contact@
committeeforjustice.org

SARAH M. SHALF
Counsel of Record
Emory Law School
Supreme Court
Advocacy Project
1301 Clifton Road
Atlanta, Georgia 30322
(404) 712-4652
sarah.shalf@emory.edu

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. Aggregate Limits Improperly Diminish the Unique and Vital Roles of Political Parties in the Electoral Process. 3

A. Aggregate contribution limits direct the flow of money to organizations making independent expenditures, which have less interest in moderation and compromise. 4

1. Aggregate contribution limits allow Super PACs and 501(c)(4) organizations to exert greater control over the electoral process, incentivizing the flow of money into independent expenditures, leading to the hyper-politicization of campaigns. 6

2. Aggregate contribution limits are anticompetitive because they suppress parties' and candidates' ability to fundraise relative to Super PACs and 501(c)(4) organizations. 8

B. Political parties play unique and vital roles in the political process and must be given the freedom and opportunity to acquire resources to fulfill their important roles..... 10

1. Political parties are well-equipped to aggregate policy views and produce a common platform. 12

2. Political parties tend to moderate political views. 14

3. Political parties are uniquely capable of mobilizing and energizing citizens. 16

C. Aggregate contribution limits have the unique effect of increasing detrimental competition between party members. 18

D. This Court has heard and rejected state interests similar to the ones posited by the Appellee for upholding aggregate limits in this case. 19

II. Data Shows that Aggregate Limits Do Not Affect the Perception of Corruption 22

A. The government interest must be constrained to quid pro quo corruption or the appearance thereof, narrowly defined by the Supreme Court 23

B. Data demonstrates that the aggregate limits do not affect the public's perception of quid pro quo corruption. 25

1. The aggregate limits have no effect on the public perception of corruption, as demonstrated by empirical surveys of public opinion over the last several decades. 25

2. The public's distrust in the government is caused by factors other than campaign spending, so the aggregate

limits will never succeed in reducing the appearance of corruption.....29
CONCLUSION.....33

TABLE OF AUTHORITIES

Cases

Branti v. Finkel,
445 U.S. 507 (1980) 13

Buckley v. Valeo,
424 U.S. 1 (1976) 22, 26

California Democratic Party v. Jones,
530 U.S. 567 (2000) 16, 19. 21, 22

Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010) 5, 6, 22, 23, 24, 25, 26, 28

Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n,
518 U.S. 604 (1996) 10

Cousins v. Wigoda,
419 U.S. 477 (1975) 20

Davis v. Bandemer,
478 U.S. 109 (1986) 10

Eu v. San Francisco Democratic Central Comm.,
489 U.S. 214 (1989). 21

McConnell v. Fed. Election Comm'n,
540 U.S. 93 (2002) 23, 24, 26

Nixon v. Shrink Missouri Gov't PAC,
528 U.S. 377 (2000) 32

Norman v. Reed,
502 U.S. 279 (1992) 10

SpeechNow.org v. Fed. Election Comm'n,
599 F.3d 686 (D.C. Cir. 2010) 6

Tashjian v. Republican Party of Connecticut,
479 U.S. 208 (1996) 10, 21

Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 10

Statutes

U.S.C. § 441a(a) (2006) 3, 27

Other Authorities

Alex Knott, *Politicians Create Record Number of Joint Fundraising Committees*, Rollcall (Sept. 17, 2010), http://www.rollcall.com/news/-49934-1.html 3

Beth Ann Rosenson, *The Effect of Political Reform Measures on Perception of Corruption*, 8 Election L.J. 31 (2009) 31

Brief Amicus Curiae Northern California Committee for Party Renewal et al. at 15 n.15, *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (No. 99-401), 2000 WL 245536 ... 16–17

Brief for Rodney A. Smith as Amicus Curiae Supporting Petitioner at 4, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2002) (No. 02-1674) 9

Clinton Rositer, Parties and Politics in America (1960) 12, 13

David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369 (1994) 24

David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 Election L. J. 23 (2006) 30

Donald P. Green & Alan S. Gerber, Get Out the Vote: How to Increase Voter Turnout (2d ed. 2008) 17

Dylan Matthews, *It's Official: The 112th Congress was the Most Polarized Ever*, Wash. Post: Wonkblog (Jan. 17, 2003), http://www.washingtonpost.com/blogs/wonkblog/2013/01/17/its-official-the-112th-congress-was-the-most-polarized-ever/ 15

Harvey Mansfield, Political Parties and American Constitutionalism, in American Political Parties and Constitutional Politics (Peter W. Schramm & Bradford P. Wilson eds., 1993) 11

Ctr. for Responsive Politics, *Donor Demographics*, OpenSecrets.org (last accessed May 11, 2013) http://opensecrets.org/overview/donordemographics.php 9

Restore Our Future, *New Normal*, YouTube (last accessed May 12, 2013) http://restoreourfuture.com/new-normal 8

James W. Endersby et al., *Electoral Mobilization in the United States*, *in* Handbook of Party Politics (Richard S. Katz & William Crotty eds., 2006) 11, 16, 18

John H. Aldred, Why Parties? (2d ed. 2011) 11

John R. Lott, Jr., *Campaign Finance Reform and Electoral Competition*, 129 Pub. Choice 263 (2006) 9

Jonathan Haidt & Marc J. Hetherington, *Look How Far We've Come* (Sept. 17, 2012), http://campaignstops.blogs.nytimes.com/2012/09/17/look-how-far-weve-come-apart/ 15

Kay Lawson & Thomas Poquntke, How Political Parties Respond: Interest Aggregation Revisited (2004) 15

Mancur Olson, The Rise and Decline of Nations (1982) 14

Michael A. Nemeroff, *The Limited Role of Campaign Finance Laws in Reducing Corruption by Elected Public Officials*, 49 How. L.J. 687 (2006) 28

Michael S. Kang, The End of Campaign Finance Law, 98 Va. L. Rev. 1 (2012) 4

Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119 (2004) 26, 27, 28, 30, 31

Rebuttal Declaration of Q. Whitfield Ayres, *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176 (2003) (No. 02-874) 28, 30, 31

Richard Jankowski, *Preference Aggregation in Political Parties and Interest Groups: A Synthesis of Corporatist and Encompassing Organization Theory*, 32 Am. J. Pol. Sci. 105 (1988) 12, 15

Robert Stein et al., *Early Voting in Texas: Electoral Reform, Party Mobilization and Voter Turnout, prepared for delivery at the annual meeting of the American Political Science Association*, Sept. 1-4, 2005, Washington, D.C., *available at* http://www.nonprofitvote.org/download-document/electoral-reform-party-mobilization-and-voter-turnout.html 17, 18

Russell J. Dalton et al., Political Parties and Democratic Linkage: How Parties Organize Democracy (2011) 16, 17, 18

Samuel Issacharoff & Pamela Karlan, The Hydraulics of Campaign Finance Reform, 77 Tex. L. Rev. 1705 (1999) 4

William J. Keefe, Parties, Politics, and Public Policy in America (8th ed. 1998) 14

INTEREST OF THE AMICUS[1]

The Committee for Justice is a nonprofit, nonpartisan organization dedicated to advancing the rule of law by promoting constitutionalist nominees to the federal judiciary and educating government officials, the media and the American people about the dangers of judicial activism and the proper role of the courts in interpreting the Constitution. Central to the rule of law is the robust enforcement of the Bill of Rights — including the First Amendment — especially when the political winds are blowing in the opposite direction, as is the case for the campaign finance regulations at issue here.

Moreover, as a 501(c)(4) organization, the Committee for Justice is keenly aware that no matter how much money flows to (c)(4)'s and Super PACs, these groups cannot serve the unique and vital roles that political parties play in the political process.

---

[1] No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief. Both Appellants have provided written consent to the filing of this brief and Appellee has provided written blanket consent to the filing of all *amicus* briefs. All consent documents are on file with the Clerk.

SUMMARY OF THE ARGUMENT

Aggregate contribution limits have a significant and divisive effect on the political process. One of the groups that is most seriously affected by aggregate limits is political parties. Aggregate contribution limits channel money away from political parties while doing little to restrict the overall flow of money into politics. That redirection of funds caused by aggregate limits has the effect of marginalizing political parties and preventing them from fulfilling their key roles: (1) aggregating political views, (2) moderating policies, and (3) energizing and mobilizing citizens. Moreover, aggregate contribution limits have the unique effect of increasing conflict between members of the same party, hampering the party's ability to unify candidates and officials.

Aggregate contribution limits also fail to further a key purported government interest put forth by the Appellee to support the limits: decreasing the perception of corruption. In the wake of several decisions by this Court limiting the legitimate government interests available to support campaign finance restrictions, the government's interest in the perception of corruption is forced to carry much of the burden of defending these aggregate contribution limits. The scope of this interest has been narrowly defined by the Supreme Court and must be limited to the appearance of *quid pro quo* corruption.

Empirical data suggests that the aggregate limits have not been successful at decreasing the public's perception of corruption or encouraging public trust in government. Campaign finance laws — including the aggregate limits — have historically had

minimal effect on levels of trust. Recent studies show that levels of trust in the government are dependent on social and political factors independent of campaign finance restrictions.

ARGUMENT

I. Aggregate Limits Improperly Diminish the Unique and Vital Roles of Political Parties in the Electoral Process.

One of the groups most affected by aggregate limits is political parties. Aggregate limits cause political parties to lose the benefit of donors who can contribute to both their coffers and those of their candidates, diminishing political parties' traditional roles in the political process. Aggregate limits do not apply to and therefore preference independent expenditure-only committees — more commonly known as Super PACs — and 501(c)(4) organizations over political parties.[2] *See* Part I.A. The relative marginalization of political parties caused by aggregate limits flies in the face of this Court's consistent and unambiguous support for the autonomy and freedom of association of political

---

[2] Traditional political actions committees, in contrast to Super PACs and 501(c)(4) organizations, are subject to the aggregate contribution limits. 2 U.S.C. § 441a(a) (2006). Another important type of committee is the "joint financing committee," which raises money for a candidate or cause and then distributes money among candidate PACs, the national party, and state and local parties. *See generally* Alex Knott, *Politicians Create Record Number of Joint Fundraising Committees*, Rollcall (Sept. 17, 2010), http://www.rollcall.com/news/-49934-1.html.

parties. *See infra* Part I.B. Aggregate limits have a unique and lasting impact on political parties by spurring conflict between party officials, making it harder for the party to serve its key roles. *See* Part I.C. This Court's precedents support the view that parties have significant rights under both the freedom of speech and the freedom of association, and that even fairly weighty state interests cannot overcome those rights. *See* Part I.D.

A. *Aggregate contribution limits direct the flow of money to organizations making independent expenditures, which have less interest in moderation and compromise.*

Aggregate contribution limits allow Super PACs and 501(c)(4) organizations to exert exaggerated control over the political process because their independent expenditures are not subject to campaign finance regulations. The market for political monies is a market like any other, in that money flows to the "lowest," that is, the least regulated point.[3] The aggregate contribution limits force money out of the hands of the parties and their candidates, the central political actors, and into the hands of Super PACs and 501(c)(4) organizations, which face far fewer regulations. As discussed

---

[3] In academia, this is known as the "hydraulics" of campaign finance reform. *See* Samuel Issacharoff & Pamela Karlan, The Hydraulics of Campaign Finance Reform, 77 Tex. L. Rev. 1705 (1999). In the post-*Citizens United* era, one scholar has referred to the flow of money into the recently deregulated area of independent expenditures as "reverse hydraulics." *See* Michael S. Kang, The End of Campaign Finance Law, 98 Va. L. Rev. 1 (2012).

further in Part II, aggregate contribution limits have no material effect on the presence or appearance of *quid pro quo* corruption. Instead, they leave politically active donors with no option but to give money to organizations making independent expenditures.

Aggregate contribution limits have the perverse effect of deregulating portions of the very democratic process they seek to protect. Aggregate limits weaken the influence of established political parties and their candidates, and strengthen the largely unregulated group of political actors operating as Super PACs and 501(c)(4) organizations. Their effects on parties and candidates are particularly pronounced following the deregulation of independent expenditures in the wake of *Citizens United v. FEC*, 558 U.S. 310 (2010). In this post-*Citizens United* era, aggregate contribution limits are particularly pernicious.

Aggregate contribution limits suppress the ability of parties and candidates to advance their goals and key positions in our democracy by directing the flow of campaign funds away from contributions to political parties and candidates, and toward the independent expenditures of Super PACs and 501(c)(4) organizations.

1. Aggregate contribution limits allow Super PACs and 501(c)(4) organizations to exert greater control over the electoral process, incentivizing the flow of money into independent expenditures, leading to the hyper-politicization of campaigns.

Campaign spending has increasingly flowed into the war chests of Super PACs and 501(c)(4) organizations and thus into independent expenditures. For example, during the 2006 election cycle, approximately $75 million was spent on independent expenditures. During the 2010 election cycle, spending on independent expenditures exploded to roughly $300 million. *Id.* at 42. While it may have once been true that campaign finance regulations controlled all the major channels through which political money moves, the stark reality of post-*Citizens United* campaign finance is that they now control only a small fraction of the money.

Independent expenditures, in the wake of *Citizens United* and *SpeechNow.org v. FEC*, are virtually unregulated. 599 F.3d 686 (D.C. Cir. 2010). In the era of deregulated independent expenditures, aggregate contribution limits do not further candidate or officeholder autonomy as intended, but rather limit candidate competition with Super PACs and 501(c)(4) organizations. While it is true that independent expenditures must be made in the absence of coordination with a campaign, the deregulation of independent expenditures has allowed such speech to dominate the market at the

expense of that endorsed by the actual campaigns. With their budgets and ability to promote their agendas marginalized, Super PACs and 501(c)(4) organizations are in a better position to disseminate political messages than the parties. When the parties and candidates need to rely on Super PACs and 501(c)(4) organizations to disseminate political messaging, that message is controlled not by parties or candidates, but by Super PACs and 501(c)(4) organizations.

The burden of aggregate contribution limits on parties is exacerbated by the fact that their competitors, at least when speaking through independent expenditures, are subject to no such limitations. An individual may contribute no more than $74,600 and $48,600 to all PACs and parties and all candidates per election cycle, respectively. *See* Federal Election Commission, *Contributions*, http://www.fec.gov/pages/-brochures/contrib.shtml. As such, parties and candidates are limited to spending on ads and other forms of messaging within the confines imposed by these contribution limits. Super PACs and 501(c)(4) organizations, however, are not so limited. They can use the funds of one wealthy donor to spread their message to the voting populace. In this sense, aggregate contribution limits make it difficult for parties and candidates to effectively compete with Super PACs and 501(c)(4) organizations for control of the political message.

Aggregate contribution limits allow Super PACs and 501(c)(4) organizations to exert greater influence over the electoral process by incentivizing political money to independent expenditures, which, in turn, forces parties and candidates — and indeed the

entire public debate — to align themselves with those entities' narrow, less moderate agendas and more inflammatory rhetoric. Take, for example, the "attack ad" released by Priorities USA Action, a Super PAC, against Mitt Romney during the 2012 election cycle titled "Understand." Priorities USAaction, *Understand*, Youtube (Aug. 7, 2012), http://youtube.com/watch?v=Nj70XqOxptU. The ad claims that while Romney was CEO of Bain Capital, he and others made millions shutting down a paper plant, leaving the workers and their families to suffer a loss of healthcare benefits.[4] As a result of public outcry in response, Romney was forced to address these comments despite their apparent inaccuracy. There was little disincentive to run such an inflammatory and inaccurate ad because the Barack Obama campaign and the Democratic National Committee could disavow responsibility for this independent expenditure.

2. Aggregate contribution limits are anticompetitive because they suppress parties' and candidates' ability to fundraise relative to Super PACs and 501(c)(4) organizations.

Aggregate contribution limits suppress the ability of parties and candidates to fundraise relative to Super PACs and 501(c)(4) organizations by forcing

---

[4] Such ads were released by proponents of both presidential candidates in the 2012 election. For an example of an Super PAC's attack on Barack Obama, see Restore Our Future's ad titled "New Normal." Restore Our Future, *New Normal*, YouTube (May 11, 2013) http://restoreourfuture.com/new-normal.

them to expand the sheer volume of donors. While parties and candidates can theoretically turn to growing their donor bases, the reality is that the volume of donors cannot be substantially increased. For parties and candidates, expanding donor numbers is no small feat. During the 1999-2000 election cycle only about 3.5 million Americans, or approximately 1.7% of the voting population, contributed to any party or candidate. Brief for Rodney A. Smith as Amicus Curiae Supporting Petitioner at 4, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2002) (No. 02-1674). During the 2010 election cycle, 0.53% of the U.S. population accounted for two-thirds of all the money donated to parties and candidates. Ctr. for Responsive Politics, *Donor Demographics*, OpenSecrets.org (last accessed May 11, 2013) http://opensecrets.org/overview/donor demographics.php.

Additionally, aggregate contribution limits are anticompetitive in that they reduce the ability of parties to help challengers defeat incumbents. Research indicates that limits on contributions, particularly to political parties, not only have a substantial negative effect on a challenger's chances of success against an incumbent, but also reduce the overall number of challengers who run for election. *See* John R. Lott, Jr., *Campaign Finance Reform and Electoral Competition*, 129 Pub. Choice 263, 292 (2006). Such effects are due to the fact that aggregate contribution limits, and other campaign finance restrictions, benefit incumbents by making it difficult for challengers to raise enough money. *Id.* Incumbents already possess a great deal of political capital, and, as a result, parties are less likely to invest their funds, limited substantially by aggregate

contribution limits, in the uphill battles of challengers. *Id.* Aggregate limits do not decrease the presence of corruption, but they do artificially curtail the pool of viable candidates available to parties.

B. *Political parties play unique and vital roles in the political process and must be given the freedom and opportunity to acquire resources to fulfill their important roles.*

The freedom to associate in pursuit of common political ideals is "an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1996) (citing NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958)). As a primary conduit of that important liberty interest, political parties play a vital role in our "constitutional tradition." *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 630 (1996) (Kennedy, J., dissenting); *see also id.* at 616 (majority opinion) (noting that "independent expression of a political party's views is 'core' First Amendment activity").[5] Parties are able to aggregate

---

[5] *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357–58 (1997) ("The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas."); *Norman v. Reed*, 502 U.S. 279, 288 (1992) (noting the "constitutional right of citizens to create and develop new political parties"); *see also Davis v. Bandemer*, 478 U.S. 109, 144–45 (1986) (O'Connor, J., concurring) ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. The preservation and health of our political institutions, state and

the views of many into discrete and clear viewpoints, create compromise-based solutions when confronted with many different positions, and then work towards translating those views into policy. However, aggregate limits prevent parties from serving these key functions because, as demonstrated in Part I.A, aggregate limits divert important resources from political parties.

Political parties have been an essential part of American politics from the very first votes of Congress. *See generally* John H. Aldred, Why Parties? 67–101 (2d ed. 2011). Parties now perform the "real work of American politics." Harvey Mansfield, Political Parties and American Constitutionalism, in American Political Parties and Constitutional Politics 3 (Peter W. Schramm & Bradford P. Wilson eds., 1993). There are few American institutions with a more important role in electoral politics and actual representation of voters: "Political parties have repeatedly been acknowledged as the critical link to democratic governance." *Handbook of Party Politics* 1 (Richard S. Katz & William Crotty eds., 2006). The volumes of legal and political science literature are peppered with expositions on the legal, theoretical, and practical importance of political parties. *See id.* (identifying several landmark studies on the role of political parties).

Political parties are unique in their breadth and importance. Because of their unique characteristics,

---

federal, depends to no small extent on the continued vitality of our two-party system, which permits both stability and measured change.")

they serve at least three key functions: aggregating views, moderating mainstream political views, and mobilizing citizens to become active in politics.

1. Political parties are well-equipped to aggregate policy views and produce a common platform.

First, one of the most important roles of a political party is the aggregation function. Aggregating views is the process by which political parties take disparate and often competing interests and distill them into a common set of views. When parties act in this way, they are sometimes known as "encompassing organizations" because they encompass a great number of different viewpoints. *E.g.*, Richard Jankowski, *Preference Aggregation in Political Parties and Interest Groups: A Synthesis of Corporatist and Encompassing Organization Theory*, 32 Am. J. Pol. Sci. 105 (1988).

Many ideas that are mainstream today once began as fringe ideas, supported by only small players in the political arena. But many of those ideas were eventually funneled into political parties and given the platform they needed because of the breadth and reach of political parties. *See* Clinton Rositer, Parties and Politics in America 42–44 (1960). Political parties are "perhaps best fitted of all agencies to convert formless hopes or frustrations into proposals that can be understood, debated, and, if found appealing, approved by the people." *Id.* at 42.

A simple example of the aggregation function occurs when parties are faced with related policies that can have important overlapping but non-obvious effects:

> For example, the steel industry might be pursuing protectionism to save itself from foreign competition. If protectionist legislation is passed, other countries might reciprocate with import restrictions, for example, against U.S. electronics. However, if both steel and electronics were represented by the same association, that association would have to take into consideration the externality (countervailing trade restrictions) in proposing trade legislation. Since such an encompassing organization, by definition, represents both the steel and trade industry, the externality . . . is not external . . . Therefore, the probability that such an encompassing organization would pursue protectionist trade policies is substantially reduced.

Id. This example demonstrates how parties that represent factions with similar but occasionally differing views can aggregate views into a common position beneficial to all. Modern major political parties are quite simply too large to be controlled by any single faction. *See Branti v. Finkel*, 445 U.S. 507, 582 (1980) (Powell, J., dissenting) ("[Broad-based parties] serve as coalitions of different interest that combine to seek national goals. The decline of party strength inevitably will enhance the influence of special interest groups whose only concern all too often is how a political candidate votes on a single issue.").

While parties are well-equipped to consider the full spate of externalities that arise from a given position, single-issue organizations are less likely to consider the full range of costs and benefits. Single-

issue organizations are more likely to be the lone recipients of the benefits from their desired position and are less likely to be harmed by the true costs. *See* Mancur Olson, The Rise and Decline of Nations 46–47 (1982). The size and breadth of political parties, however, in contrast to comparable Super PACs and single-interest organizations, makes parties more likely to consider a wide variety of viewpoints.

2. Political parties tend to moderate political views.

Second, parties can be an important mechanism for moderating political views. Political parties tend to be moderating forces in American politics because of their fierce quests for votes and their need to appeal to as many voters as possible. In order to appeal to as many voters as possible, parties frequently moderate their positions and rhetoric. William J. Keefe, Parties, Politics, and Public Policy in America 69–71 (8th ed. 1998). Even when some party leaders may *want* to take extreme positions, the size and breadth of political parties mean that nearly all major decisions are the result of moderating compromise. *Id.* at 70. Moreover, they serve an important role in creating compromise within narrowly focused factions; they create one clearinghouse for ideas to be developed and then put into action. *See generally* Kay Lawson & Thomas

Poquntke, How Political Parties Respond: Interest Aggregation Revisited (2004); Jankowski, *supra*.[6]

The need for political parties to play their moderating role is more salient today than ever before. By at least one measure, the recently elected 112th Congress was the most polarized ever, featuring an uptick in ideological polarization from both parties. Dylan Matthews, *It's Official: The 112th Congress was the Most Polarized Ever*, Wash. Post: Wonkblog (Jan. 17, 2003), http://www.washingtonpost.com/blogs/wonkblog/2013/01/17/its-official-the-112th-congress-was-the-most-polarized-ever/. The only good news is that "it is mathematically impossible for [C]ongress to get much more polarized." Jonathan Haidt & Marc J. Hetherington, *Look How Far We've Come* (Sept. 17, 2012), http://campaignstops.blogs.nytimes.com/2012/09/17/look-how-far-weve-come-apart/.

National politics have always seen an ebb and flow between polarized and centrist politics, but aggregate contribution limits threaten to impose a structural change that clogs the natural pendulum of national politics. The need for parties to serve as a clearinghouse of ideas has never been greater.

The widely disseminated attack ads from the 2012 campaign are illustrative of the effect that polarization can have on civic discourse. *See* Part I.A.2. When unaccountable Super PACs and 501(c)(4) organizations run negative attack ads, they

---

[6] For further discussion on the role of Super PACs and 501(c)(4) organizations in politicizing the electoral process, see Part I.B.

quickly dominate the news cycle, thereby hijacking the national debate over important issues. Increasingly powerful, polarized organizations not only control how candidates and parties behave, but how ordinary citizens view national politics. Comparatively moderate political parties are less likely to produce and air the same number and type of attack ads precisely because they are more accountable for their behavior.

3. Political parties are uniquely capable of mobilizing and energizing citizens.

Finally, political parties play an important role in mobilizing citizens to vote. Political parties are able to perform this function because their strengths align well with the factors that most heavily influence voter engagement and turnout. Generally, voter turnout is a function of (1) underlying individual interest in an election, (2) enthusiasm for a race based on the attention it receives, and (3) labor-intensive efforts to mobilize voters on a nearly person-to-person basis. *See* Russell J. Dalton et al., Political Parties and Democratic Linkage: How Parties Organize Democracy 57 (2011); James W. Endersby et al., *Electoral Mobilization in the United States*, *in* Handbook of Party Politics 330 (Richard S. Katz & William Crotty eds., 2006). One study from the 1990s revealed that persons who were affiliated with one of the two major American political parties were "more likely to have voted, to be interested in, pay attention to, or care about the results of the presidential elections, than persons unaffiliated with a political party, by significant margins." Brief Amicus Curiae Northern California Committee for

Party Renewal et al. at 15 n.15, *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (No. 99-401), 2000 WL 245536.

Political parties are particularly well suited to address the last two factors, enthusiasm and voter turnout. Their human resources and organization provide a platform through which they can call attention to elections and reach out to individual potential voters. Individualized contact has been identified as a vital element in voter participation studies and social science research supports the view that voters turn out with increased frequency if they are personally asked to do so. *See* Donald P. Green & Alan S. Gerber, Get Out the Vote: How to Increase Voter Turnout (2d ed. 2008). The most effective techniques for getting citizens engaged in elections are also the most organizationally challenging; reaching out to voters year after year requires a stunning amount of resources. Because of their access to volunteers and party faithful, political parties are especially gifted at bringing voters to the voting booth. *See* Dalton et al., *supra*, at 57–74; *see also* Robert Stein et al., *Early Voting in Texas: Electoral Reform, Party Mobilization and Voter Turnout, prepared for delivery at the annual meeting of the American Political Science Association*, Sept. 1-4, 2005, Washington, D.C., *available at* http://www.nonprofitvote.org/download-document/electoral-reform-party-mobilization-and-voter-turnout.html ("[W]ithout the efforts of political parties and their candidates, electoral reforms are likely to continue to have a marginal effect on voter turnout.").

For political parties, their "livelihoods and very survival depend[] on who turns out to vote." Dalton

et al., *supra* at 57.[7] Out of necessity then, parties have "developed extensive mechanisms to identify potential voters and to mobilize them on election day." *Id.*

Policy-oriented groups and get-out-the-vote organizations continue to influence voter mobilization, "but their resources and efforts pale in comparison with the activities of political parties." *Id.* at 58. In the last decade, political parties have taken note of social science research demonstrating the importance of personal contact and have "invested substantial resources in [get out the vote efforts], canvassing, and grassroots programs." Endersby et al., *supra*, at 334.

C. *Aggregate contribution limits have the unique effect of increasing detrimental competition between party members.*

Among campaign finance restrictions, aggregate contribution limits impose unique harms on candidate and parties. Among the most notable unique harms is that they create competition within parties for coveted donor support. Forced *intra*-party competition has the effect of negatively decreasing cooperation and compromise, and instead forces

---

[7] In this way, political parties differ dramatically from policy-oriented Super PACs and 501(c)(4) organizations. Groups advocating a particular position are concerned with garnering enough votes in the legislature for their policy preferences, regardless of how those votes come to be. Political parties, by comparison, have a much more direct and single-minded interest in who turns out to vote: the scope of their governing power largely begins and ends in the election process.

factions to break away from the party apparatus to jockey for funds. *See* Brief for Appellant Shaun McCutcheon at 28–31.

Intra-party cooperation and cohesion is threatened by the aggregate contribution limit because the limit forces candidates and elected officials to fight for the limited funds available for their general cause. For example, a wealthy donor with fervently Democratic ideals might choose to give the maximum base contribution to a dozen different Democratic party committees at the national, state, and local levels, as well as to individual candidates. But because of the aggregate limit, she can give that maximum contribution to only a handful of those committees and fewer candidates. The aggregate limit incentivizes committees and individual candidates to move toward the areas where they can jostle for contributions from key donors. Without the aggregate limit—in other words, with only the base limit—party officials at every level could work together to build a comprehensive platform without fear of losing donations to *other parts of their own organization*.

D. *This Court has heard and rejected state interests similar to the ones posited by the Appellee for upholding aggregate limits in this case.*

This Court has frequently recognized that political parties have a right to a certain degree of autonomy and self-governance that largely stems from the First Amendment guarantee of the right to association. *See, e.g.*, *California Democratic Party v.*

Jones, 530 U.S. 567, 572 (2000) ("Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself.") (citation omitted). While those cases differ from the one at bar in some ways, they all signal this Court's recognition of the important and unique value of political parties. This Court's precedents also caution against the overregulation and marginalization of parties. Against this precedent, aggregate limits impermissibly hamper the right of political parties to set their own agenda and interact with their own membership.

In the early 1970s, the Court acknowledged that government intervention affecting parties implicated "[v]ital rights of association" even in the face of well-established state interests. *See* Lowenstein, *supra*, at 457. In later cases, this Court has always been careful to protect the right of association that belongs to both the party and its members. *See, e.g.*, *Cousins v. Wigoda*, 419 U.S. 477 (1975) (overturning a state court intervention into a political party's internal affairs).

Through the 1980s to the current day, the Court continued to expand the right of association for political parties. The Court has been protective of the right of political parties to "broaden the base of public participation in and support for [their] activities," even going so far as to recognize that broadening a base of support "is conduct undeniably central to the exercise of the right of association."

Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 215 (1986); *see also supra* Part I.B (noting the important role parties play energizing citizens and mobilizing them to vote). This skepticism of government intervention into the affairs of political parties has continued in more recent cases. *See, e.g.*, *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214 (1989).

These cases and others demonstrate this Court's consistent and strong recognition of party rights, even in the face of significant state interests. In each of the cases where the Court upheld party autonomy over state regulation, state governments asserted substantive and meaningful interests. However, those interests were rarely strong enough to overcome the freedom of association recognized for political parties.

For example, in *Tashjian v. Republican Party of Connecticut*, Connecticut defended a closed primary on the grounds that it "ensur[ed] the administrability of the primary system, prevent[ed] raiding, avoid[ed] voter confusion, and protect[ed] the responsibility of party government." 479 U.S. 208, 217 (1986). In *San Francisco Democratic Central Committee*, California defended a prohibition on endorsements by official governing bodies with twin state interests in "stable government and protecting voters from confusion and undue influence." 489 U.S. 214, 226 (1989). In *California Democratic Party v. Jones*, California offered a whopping seven state interests in support of its blanket primary, including: "producing elected officials who better represent the electorate," "expanding candidate

debate beyond the scope of partisan concerns," and "ensur[ing] that disenfranchised persons enjoy the right to an effective vote." 530 U.S. 567, 582–86 (2000).

This Court was able to quickly evaluate and discard each of these purported state interests. Some of the discarded interests were labeled as worthwhile and "highly significant values." *See, e.g.*, *id.* at 584. But this Court declined to evaluate those values "in the abstract," *id.*, instead choosing to first decide whether the state's *particular* restriction furthered a *particular* interest. Concluding that the state's attractive values were hardly furthered by their restrictions on the vital rights of parties, this Court discarded even the most weighty state interests.

II. Data Shows that Aggregate Limits Do Not Affect the Perception of Corruption.

The aggregate limits cannot be justified by the government interest in preventing the appearance or occurrence of corruption. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 344 (2010) (citing *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)).

The government interest that justifies campaign finance restrictions is quite narrow: It is strictly limited to preventing the appearance or occurrence of *quid pro quo* corruption. The aggregate limits, imposed in addition to the base contribution limits, must be justified by a cognizable risk that the base limits will be circumvented, *Buckley*, 424 U.S. at 38, allowing an individual to avoid the government restrictions and engage in activity that is covered under the narrow definition of quid pro quo corruption.

Data suggests that campaign finance restrictions (including the aggregate limits) have been largely ineffective at improving the public's trust in government. Instead, public mistrust in the government is largely influenced by other factors, and in some cases, stricter campaign restrictions have even increased perceptions of corruption.

A. *The government interest must be constrained to quid pro quo corruption or the appearance thereof, narrowly defined by the Supreme Court.*

The government interest in preventing the appearance of corruption is strictly limited to *quid pro quo* corruption: "dollars for political favors." *Citizens United*, 558 U.S. at 360 (citing *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

Without a strict *quid pro quo* definition, the term "corruption" is so vague it becomes meaningless. Without such a definition, the government interest in "corruption" is "unbounded and susceptible to no limiting principle." *Id.* (citing *McConnell*, 540 U.S. at 296 (Kennedy, J., concurring in the judgment in part and dissenting in part)). Absent this "limiting principle," the term "corruption" can improperly be applied to any number of nebulous concepts that the government has no proper interest in managing, such as: 1) gratitude, 2) citizens' access to elected officials, and even 3) inequality in amounts of political speech.

Gratitude does not constitute corruption. The Court has made clear that the mere fact that an elected official feels grateful does not give rise to the

sort of corruption that the government has an interest in preventing. *Id.*; *McConnell* 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part). This limitation makes sense: an elected official may feel grateful for a local newspaper endorsement or the votes of constituents. This gratitude, however, is not *quid pro quo* corruption.

Likewise, access to, or influence over, an elected official is not corruption. *Citizens United*, 558 U.S. at 360 ("the appearance of influence or access will not cause the electorate to lose faith in this democracy"); *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part). As the Court has noted, our entire system of representative democracy is "premised on the responsiveness" of elected leaders to their constituents. *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in the judgment in part and dissenting in part). The court has been clear that "the appearance of influence or access will not cause the electorate to lose faith in this democracy." *Citizens United*, 558 U.S. at 360.

Finally, impermissible "inequality" arguments about the "inequality" of political speech are often implicit in overbroad definitions of corruption. *See* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum. L. Rev. 1369, 1371–75 (1994) (arguing that much of the "corruption problem" could be eliminated if the "inequality problem" was solved). However, a government interest in "equalizing" political speech has long been rejected by the Court. *Citizens United*, 558 U.S. 349-52; 424 U.S. at 47–49 ("[T]he concept

that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). Just as the discredited "anti-distortion" argument was rejected as implicitly seeking to "equalize" political speech, *Citizens United*, 130 S. Ct. at 904, managing the public's perception of corruption caused by unequal amounts of political speech does not constitute a proper government interest. *Id.* at 910.

In sum, the Court has been clear that the government interest in managing public perception is strictly limited to perceived *quid pro quo* corruption and does not extend to cover gratitude, access, or inequality.

B. *Data demonstrates that the aggregate limits do not affect the public's perception of quid pro quo corruption.*

Campaign finance limits have no effect on the public perception of corruption, as demonstrated by empirical surveys of public opinion over the last several decades. This suggests that the marginal effect of the additional aggregate limits likewise does not improve the public's trust in the government.

1. The aggregate limits have no effect on the public perception of corruption, as demonstrated by empirical surveys of public opinion over the last several decades.

The aggregate limits, then, cannot be justified as fulfilling a legitimate government interest in

decreasing the perception of corruption because the evidence suggests that campaign finance restrictions – including the aggregate limits – have had no appreciable impact on that perception. This evidence calls into question the *Buckley* assumption that uncontrolled campaign finance will result in an increased public appearance of government corruption. *Buckley*, 242 U.S. at 27. It should also cast doubt on the argument that the limits are "closely drawn," *McConnell* 540 U.S. at 136, or even substantially related to the asserted government interest. Aggregate limits have no impact on the perception of corruption.

Data demonstrates that the aggregate limits enacted in 1974 (Federal Election Campaign Act ["FECA"]) and 2002 (Bipartisan Campaign Reform Act ["BCRA"]) have not been successful at reducing the appearance of corruption among the public or increasing the public's trust in the government. [8] Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 147 fig.1 (2004) (demonstrating that public trust levels dropped significantly in the early 1970s and 80s, suggesting that the 1974 passage of FECA, including the original aggregate limits had

---

[8] As noted above, this is one of the two traditional government interests that justify campaign finance restrictions. The other interest, preventing the *occurrence* of corruption, is beyond the scope of this brief and will not be discussed. It is worth noting, however, that both government interests are strictly limited to *quid pro quo* corruption. *Citizens United*, 558 U.S. at 360.

little to no effect on the public perception of corruption).

The public perception that the government was "crooked" or controlled by "special interests" lessened for a short time following FECA. However, public distrust of government soon began to rise again and by the early 1990s, public trust in the government was even lower than pre-FECA levels, notwithstanding the FECA restrictions, including aggregate limits. *Id.* Although public trust in the government improved in the mid- to late-90s, this increase in trust occurred despite the enormous growth of "soft money" expenditures during this time. *Id.* at 148.

In 2002, BCRA was enacted, imposing new campaign restrictions, including aggregate limits. 2 U.S.C. § 441a(a)(3) (2006). Like FECA, the new law had little appreciable impact on the public levels of trust in the government. Persily & Lammie, *supra*, at 149. Although there was a brief increase of public trust following BCRA, *id.*, within a mere two years, trust returned to the same low levels that persisted prior to BCRA. *Id.* The brief increase came despite the fact that the law increased the dollar amount of donations allowable under the aggregate limit, 2 U.S.C. § 441a(a)(3) (2006).

The fact that the FECA and BCRA restrictions, including aggregate limits, have had such a limited effect on the public's trust in government calls into question the utility of the aggregate limits.

Additionally, surveys of state laws with strict aggregate limits show little impact on voter "engagement" (as measured by participation levels).

Michael A. Nemeroff, *The Limited Role of Campaign Finance Laws in Reducing Corruption by Elected Public Officials*, 49 How. L.J. 687, 704–14 (2006). This implicitly suggests that even in states without an aggregate limit on campaign finance, there is not such a widespread perception of corruption that it impacts the willingness of voters to participate in the election.

In the past, the government has sought to justify campaign finance restrictions by claiming the restrictions result in a positive effect on the perception of corruption, but data used in these arguments have been based on polls relying on misleading or vague questions. In *McConnell*, surveys purporting to demonstrate an improvement in public perception of corruption were not properly focused on the limits at issue. Rebuttal Declaration of Q. Whitfield Ayres, *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176 (2003) (No. 02-874). When the surveys were repeated using the proper contribution limits, the limits were shown to have no appreciable impact on public's perception of corruption. *Id.*

Additionally, measures of public opinion used to justify the aggregate limits are irrelevant unless they're limited to the perception of *quid pro quo* corruption, given the narrow government interest recognized by this court. *Citizens United*, 558 U.S. at 360. Much of the data presented by the government in *McConnell* relied on surveys that measured the perception of "unfairness" or "influence of special interests" in the current government. *See generally* Persily & Lammie, *supra*, at 139–44 (criticizing many of the public opinion polls used in *McConnell*

for not being properly focused on *quid pro quo* corruption, but rather measuring public perception about "influence" or "access"). Such overbroad surveys of public opinion cannot be used to justify the aggregate limits. The relevant government interest is strictly "limited to quid pro quo corruption." *Citizens United*, 130 S. Ct at 909–10.

In sum, the aggregate limits, as with most campaign finance restrictions, have not been successful at impacting — let alone substantially reducing — the public perception of *quid pro quo* corruption. Surveys that purport to demonstrate otherwise are often inapplicable because they rely on general notions of unfairness rather than the appearance of *quid pro quo* corruption, narrowly defined by the Supreme Court.

2. The public's distrust in the government is caused by factors other than campaign spending, so the aggregate limits will never succeed in reducing the appearance of corruption.

As demonstrated above, the aggregate limits do not impact the public's perception of corruption, and in fact, the public perception of corruption is controlled by a variety of other factors that are independent of campaign finance.

Historically, mistrust in the government has been driven by factors unrelated to the financing of political campaigns. Factors including the Vietnam War and a general increase in public cynicism have spurred a decline of trust in the government that has continued from the 1950s to today. David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and*

Political Efficacy: Evidence from the States, 5 Election L. J. 23, 26–27 (2006). In the 1980s, the level of distrust grew higher with stagflation and the Iran hostage crisis. *Id.*

More recent studies have likewise shown that perceptions of corruption are controlled by a variety of factors unrelated to the aggregate limits – for example, the popularity of the president, government fiscal policy, whether the country is in economic growth or recession, and individual factors, such as personal views about society. *Id.* at 121, 173. Taken together, these studies cast grave doubt on the claim that the government interest in reducing perceptions of corruption can be addressed through aggregate limits.

The grave doubt is only magnified by the long-standing public belief that campaign finance laws in *any* form will not be successful – for example, at decreasing the influence of "special interests." Measures of how people perceive the power of such special interest groups are often used to evaluate the public's perception of the government's trustworthiness. *See, e.g.*, Persily & Lammie, *supra*, at 142–43 (discussing the results of Gallup poll that focus on the public's perception of "special interest" groups' influence over the government). For at least four years prior to the passage of the BCRA, over sixty percent of Americans consistently believed that campaign finance regulation would not diminish the power of special interests. Rebuttal Declaration of Q. Whitfield Ayres, *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176 (2003) (No. 02-874). After the passage of the BCRA, this number is essentially unchanged. Today, two-thirds of Americans

consistently believe that "special interests" will maintain power regardless of campaign finance reforms. *Id.*; Persily & Lammie, *supra*, at 147. The fact that neither BCRA nor FECA has had an impact on the perceived power of special interests – a measure of the public's trust in the government – suggests that campaign finance restrictions, including aggregate limits, cannot decrease distrust of the government generally, no less that component of distrust flowing from the perception of corruption.

Moreover, upticks in the public perceptions of corruption may actually be due to the prominence of stricter campaign finance regulations in the public debate. *See* Beth Ann Rosenson, *The Effect of Political Reform Measures on Perception of Corruption*, 8 Election L.J. 31 (2009). Stricter campaign finance laws typically result in an increase in alleged campaign finance violations or investigations thereof, both of which tend to increase the public's perception of corruption. *Id.* at 40. Data actually points to an increase in perceptions of corruption where campaign finance laws are more restrictive. Even the most informed and knowledgeable citizens perceive greater corruption where campaign finance laws are more restrictive. *Id.* at 42–43. In a study based on the perceptions of corruption in state governments, campaign finance regulation resulted in a higher public perception of corruption. *Id.* at 40.

The possibility that campaign finance restrictions, including the aggregate limits, may actually be increasing the perception of corruption is sobering. These restrictions may be the ultimate "vicious cycle": public trust in government drops due to

political events; the government imposes new base and aggregate limits to address the drop; however, the new focus on campaign finance and increased reports of violations causes an increase in the public perception of corruption; the public perception of corruption justifies the imposition of stricter contribution limits; *ad infinitum*.

In conclusion, the aggregate limits cannot be justified by the government's interest in preventing the perception of corruption. Empirical data demonstrates that the aggregate limits have been ineffective at improving public trust of the government, largely because trust in the government is controlled by other factors. This evidence casts grave doubts on the government's theory that it can prevent the perception of corruption by restricting individuals' aggregate donations. *Cf. Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 394–95 (2000) (noting that if "doubt [was cast] on the apparent implications of *Buckley's* evidence, then that may require the government to provide more extensive evidentiary documentation").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

CURT A. LEVEY
The Committee for Justice
722 12th Street, N.W.,
4th Floor
Washington, DC 20005
(202) 270-7748
contact@
committeeforjustice.org

SARAH M. SHALF
Counsel of Record
Emory Law School
Supreme Court
Advocacy Project
1301 Clifton Road
Atlanta, Georgia 30321
(404) 712-4652
sarah.shalf@emory.edu

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-536

In The
Supreme Court of the United States

SHAUN MCCUTCHEON, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICI CURIAE* COMMUNICATIONS WORKERS OF AMERICA, GREENPEACE, NAACP, SIERRA CLUB, AMERICAN FEDERATION OF TEACHERS, MAIN STREET ALLIANCE, OURTIME.ORG, PEOPLE FOR THE AMERICAN WAY FOUNDATION, ROCK THE VOTE, U.S.PIRG, WORKING FAMILIES ORGANIZATION AND DĒMOS IN SUPPORT OF APPELLEE

ELIZABETH KENNEDY
ADAM LIOZ
DĒMOS
220 Fifth Ave.
2nd Floor
New York, NY 10001
(212) 633-1405

BRENDA WRIGHT
Counsel of Record
DĒMOS
358 Chestnut Hill Ave.
Suite 303
Brighton, MA 02135
(617) 232-5885
bwright@demos.org

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. AGGREGATE CONTRIBUTION LIMITS ARE A LONGSTANDING MEASURE TO MEET THE GOVERNMENT'S RESPONSIBILITY TO FIGHT THE REALITY AND APPEARANCE OF CORRUPTION 4

A. Aggregate contribution limits fight the reality and appearance of corruption without unduly burdening the exercise of a constitutional right..... 5

B. Government has a compelling interest in fighting the reality and appearance of corruption to protect the integrity of democratic governance..... 7

II. THE EROSION OF PUBLIC CONFIDENCE IN GOVERNMENT STEMMING FROM CONTRIBUTIONS THAT CREATE THE APPEARANCE OF CORRUPTION IS A SERIOUS, AND NOT A SPECULATIVE, CONCERN 12

A. Americans' confidence in government is at an all-time low..... 13

TABLE OF CONTENTS – Continued

Page

B. Americans believe their elected representatives are more responsive to financial supporters than to constituents or the public interest 15

C. Americans believe that government's differential response to wealthy donors is caused by the corrupting influence of large contributions 18

III. AMERICANS' CONCERNS ABOUT DONORS' IMPROPER INFLUENCE OVER GOVERNMENT ARE JUSTIFIED AND NOT SPECULATIVE 22

A. The policy preferences of those who can make large donations differ greatly from those of ordinary Americans 23

B. The largest contributors already dominate the funding of U.S. elections 27

C. Public policy outcomes in the U.S. are strongly responsive to the preferences of the affluent, even when those preferences diverge markedly from those of the general public 32

IV. STRIKING THE AGGREGATE LIMITS WILL INCREASE THE DANGER OF CORRUPTION AND AGGRAVATE THE APPEARANCE OF CORRUPTION 37

CONCLUSION 41

TABLE OF CONTENTS – Continued

Page

APPENDIX

ORGANIZATIONAL DESCRIPTIONS OF *AMICI CURIAE* 1a

TABLE OF AUTHORITIES

Page

CASES

Beaumont v. FEC, 539 U.S. 146 (2002) 6, 40

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) ....*passim*

California Medical Ass'n v. FEC, 453 U.S. 182 (1981).....10

Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981).....36

Citizens United v. FEC, 558 U.S. 310 (2010) ...11, 15, 32

FEC v. Colo. Republican Fed. Campaign Comm. (*Colorado II*), 533 U.S. 431 (2001).....8, 9

FEC v. National Right to Work Comm., 459 U.S. 197 (1982).....10

FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 17

FEC v. Colorado Federal Campaign Comm., 533 U.S. 431 (2001).....8, 9

McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003).....31

McConnell v. FEC, 540 U.S. 93 (2003).....*passim*

McCutcheon v. FEC, 893 F. Supp. 2d 133 (D.D.C. 2012).....6, 7

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).....12, 16

TABLE OF AUTHORITIES – Continued

Page

U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548 (1973) 38

STATUTES, REGULATIONS, AND RULES

2 U.S.C. § 441a(a)(3) (2011) 4, 5

76 Fed. Reg. 8,370 (Feb. 14, 2011) 4

Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 ..... 5, 8

Pub. L. No. 107-155, § 307, 116 Stat. 81 (2002) 5, 11, 12

ADMINISTRATIVE OPINIONS, RULEMAKINGS, AND NOTICES

FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, Notice 2013-03, 78 Fed. Reg. 8,530 (Feb. 6, 2013) 4

OTHER AUTHORITIES

Am. Nat'l Election Studies, *The ANES Guide to Public Opinion and Electoral Behavior* (last visited July 12, 2013) 14, 38

Am. Nat'l Election Studies, *User's Guide and Codebook for the Preliminary Release of the ANES 2012 Time Series Study* (July 1, 2013) 14, 38

Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (2008) 35

TABLE OF AUTHORITIES – Continued

Page

Paul Blumenthal, *Chris Murphy: 'Soul-Crushing' Fundraising Is Bad for Congress*, Huffington Post (May 7, 2013, 5:40 PM).....30

Brennan Ctr. for Justice, *National Survey: Super PACs, Corruption, and Democracy* (Apr. 24, 2012).....16

David Callahan & J. Mijin Cha, *Stacked Deck: How the Dominance of Politics by the Affluent and Business Undermines Economic Mobility in America*, Dēmos (2013).....25, 35

Center for Responsive Politics, *Donor Demographics*, OpenSecrets.Org.....28

Common Cause, *Fair Elections Poll*, Money in Politics (Feb. 2009).....20

Lee Drutman, Sunlight Foundation, *The Political 1% of the 1% in 2012*, Sunlight Foundation Blog (June 24, 2013, 9:00 AM).....27, 28, 30

Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012).....26, 33, 34, 35, 36

John Green, et al., *Individual Congressional Campaign Contributors: Wealthy, Conservative, and Reform-Minded* (1998).....29

Greenberg Quinlan Rosner Research, *Money in Politics is a Ballot Box Issue*, Democracy Corps Nat'l Surveys (May 9, 2012).....20, 39

TABLE OF AUTHORITIES – Continued

Page

Greenberg Quinlan Rosner Research, *Voters Push Back against Big Money Politics*, Democracy Corps Nat'l Surveys (Nov. 13, 2012) 17

Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118 (2010) 18, 19

Liz Kennedy, *Citizens Actually United: The Overwhelming, Bi-Partisan Opposition to Corporate Political Spending and Support for Achievable Reforms*, Dēmos (Oct. 25, 2012) 15, 20

Adam Lioz & Blair Bowie, *Billion Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections*, Dēmos (2013) 27, 28

Mem. of Campaign Legal Center & Democracy 21 as *Amici Curiae* in Opp'n Pls.['] Mot. Prelim. Inj., *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (No. 12cv1034(JEB)(JRB)(RLW)) 7

Memorandum from Celinda Lake et al., Lake Research Partners & Brian Nienaber & Ashlee Rich, Tarrance Group, *Nationwide Poll Results on Economic Recovery – January 2009* (Feb. 1, 2009) 16, 19

Elizabeth Mendes & Joy Wilke, Gallup, *Americans' Confidence in Congress Falls to Lowest on Record*, Gallup Poll (June 13, 2013) 14

Merits Brief of the Appellee, *McCutcheon v. FEC*, No. 12-536, 2013 WL 3773847 6

TABLE OF AUTHORITIES – Continued

Page

Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 Persp. On Pol. 51 (2013) 24, 25, 26, 28, 29

Susan Page, *Why 90 Million Americans Won't Vote in November*, USA Today, Aug. 15, 2012 37

Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Penn. L. Rev. 119 (2004) 21

Robert Post, *Campaign Finance Regulation and First Amendment Fundamentals*, in *Money, Politics, and the Constitution: Beyond Citizens United* (M. Youn, ed. 2011) 13

Public Campaign, *Color of Money: The 2004 Presidential Race* (2004) 29

Martin Schram, *Speaking Freely: How Congress is Compromised in the Great Money Chase, Center for Responsive Politics* (1995) 18

Molly J. Walker-Wilson, *Financing Elections and "Appearance of Corruption": Citizen Attitudes and Behavior in 2012* (St. Louis Univ. Legal Studies Research Paper Series, No. 2013-14, 2013) 21

INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of *amici curiae* Communications Workers of America, Greenpeace, NAACP, Sierra Club, the American Federation of Teachers, Main Street Alliance, OurTime.org, People for the American Way Foundation, Rock the Vote, U.S.PIRG, the Working Families Organization, and Dēmos. *Amici* collectively represent millions of Americans who are concerned about the effect of large campaign contributions on the integrity and responsiveness of the United States government. A description of each *amicus* is included in an Appendix to this Brief.[1]

SUMMARY OF ARGUMENT

This Court has long grounded its campaign finance jurisprudence on the government's compelling interest in fighting corruption or its appearance. Fighting the perception and the reality of a democratic government corrupted by the improper influence of financial support, however, is more than just a compelling reason for regulation; it is a responsibility of any democratic government. Legitimacy – the belief

[1] Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* has made a monetary contribution to the preparation or submission of this brief. The written consents of the parties to the filing of this brief have been filed with the Clerk.

by the people that they are fairly represented – after all, is a first principle of democratic governance.

Aggregate contribution limits function in tandem with base contribution limits to protect the legitimacy of our democratic government by combatting the perception and reality of corruption. *See infra* Point I. Aggregate limits ensure that no one donor can find ways to funnel hundreds of thousands of dollars to a candidate or a party, and candidates and officeholders cannot solicit huge sums from a single donor – which evidence suggests would foster a belief among the public that elected officials are improperly influenced by such large contributions. At the same time, contribution limits impose only an indirect burden on speech and thus are not subject to strict scrutiny. For these reasons, this Court upheld aggregate contribution limits in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and has had no cause to reconsider this sound principle.

Appellants ask this Court to overrule settled precedent regarding contribution limits at a particularly inopportune time, because even with these limits in place public confidence in U.S. government is by some measures at an all-time low. Public opinion data demonstrate that this lack of confidence in government is tied to the widespread perception that government is more responsive to financial supporters than to voters or the public interest, and is corrupted by the improper influence of money in campaigns. *See infra* Point II.

Recent political science research has demonstrated more clearly than ever before that this public concern is not speculative or irrational but rather quite closely tethered to reality. *See infra* Point III. Campaign funding has long been the province of large donors, but the near-dominance of a tiny fraction of the U.S. population over contributions to federal candidates has escalated in recent years. Important new research has documented that the wealthy have starkly different policy priorities than the general public, especially on economic issues, and that government in the U.S. responds differentially – often dramatically so – to the preferences of those who are able to make large campaign contributions, even when these preferences run counter to those of the general public. This particularly affects communities of color, which are far less likely to be represented among the ranks of those whose policy preferences appear to influence officeholders. Campaign finance is a significant factor in this dynamic.

Striking aggregate contribution limits will exacerbate problems of corruption and its appearance. *See infra* Point IV. Without these limits, a small cadre of donors will be able to contribute millions of dollars to candidates, parties, and political action committees, and candidates and officeholders will be permitted to solicit large sums from potential donors, functionally reviving the "soft money" system that Congress acted to end a mere 11 years ago. This will provide further (and renewed) incentive for federal candidates and officeholders to grant these donors improper influence,

skewing policy outcomes more and more towards the preferences of donors as opposed to those of the general public.

Perceptions of corruption are already at dangerous levels in the United States. These perceptions are not irrational fears but rather reasoned reactions to a system that is more responsive to the policy preferences of a narrow segment of the electorate as a result of the improper influence gained through large financial contributions. This Court must not risk undermining the legitimacy of our Republic by overturning longstanding precedent to strike a key bulwark against the reality and appearance of corruption of our democratic government.

ARGUMENT

I. AGGREGATE CONTRIBUTION LIMITS ARE A LONGSTANDING MEASURE TO MEET THE GOVERNMENT'S RESPONSIBILITY TO FIGHT THE REALITY AND APPEARANCE OF CORRUPTION.

Appellants challenge the aggregate biennial limit that currently caps the total that an individual can contribute to all federal candidates, parties, and committees combined at $123,200. *See* 2 U.S.C. § 441a(a)(3) (2011); 76 Fed. Reg. 8,370 (Feb. 14, 2011); FEC, *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, Notice 2013-03, 78 Fed. Reg.

8,530, 8,532 (Feb. 6, 2013). The $123,200 aggregate limit is broken down between a $48,600 ceiling on contributions to all federal candidates and their committees, and a $74,600 limit on contributions to all other committees (including no more than $48,600 to committees other than national party committees). 2 U.S.C. § 441a(a)(3). These limits are needed to ensure that donors cannot circumvent the complementary limits on contributions to individual candidates, parties and committees, and to serve the long-recognized governmental interest in deterring "the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions." *Buckley*, 424 U.S. at 58.

A. Aggregate contribution limits fight the reality and appearance of corruption without unduly burdening the exercise of a constitutional right.

Congress adopted base and aggregate contribution limits in the 1974 Amendments to the Federal Election Campaign Act of 1971 (FECA), which were upheld in *Buckley*. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3. Though details of the protections have changed, their purpose to fight the reality and appearance of corruption has not.

Appellants challenge the aggregate contribution limits adopted in the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Pub. L. No. 107-155, § 307, 116 Stat. 81, 102-03 (2002). The court below upheld them,

finding that without the aggregate limits, "an individual might contribute $3.5 million to one party and its affiliated committees in a single election cycle." *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 135 (D.D.C. 2012).

In *Buckley*, the Court determined that "[w]hile contributions may result in political expression if spent by a candidate or an association . . . , the transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley*, 424 U.S. at 20-21. Hence, the aggregate contribution limits entail only a marginal restriction upon First Amendment rights, and thus this "quite modest restraint," *id.* at 38, is subject to less exacting scrutiny than is a limit on expenditures. This core distinction between limits on expenditures and limits on contributions has remained at the heart of this Court's campaign finance jurisprudence since *Buckley*. *See, e.g.*, *Beaumont v. FEC*, 539 U.S. 146, 162 (2002) ("[A] contribution limit involving significant interference with associational rights passes muster if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." (internal quotation marks omitted)).[2] Appellant McCutcheon

---

[2] *Amici* agree with, and do not further address here, the FEC's argument that Appellants have presented no sound justification for the Court to overrule *Buckley* by applying strict scrutiny to the contribution limits challenged in this case. *See* Merits Brief of the Appellee at 25-31, *McCutcheon v. FEC*, No. 12-536, 2013 WL 3773847.

can exercise his associational rights by contributing money to as many candidates as he likes, and is not barred from giving to any candidate, party, or committee. He merely has to abide by clear total ceilings on contributions because Congress has determined that aggregate limits are important to fight the reality and appearance of corruption and to prevent circumvention of the base limits.

In *McConnell v. FEC*, 540 U.S. 93 (2003), this Court upheld a ban on "soft money" contributions to political parties precisely because of the importance of effective contribution limits to fighting corruption and its appearance. The aggregate limits at issue in this case serve the same function – namely, preventing the inevitable reality and appearance of corruption when candidates and officeholders solicit huge sums from individuals with particular policy agendas, and when such individuals are permitted to funnel contributions well over base limits to key officeholders or party leaders. *See* Mem. of Campaign Legal Center & Democracy 21 as *Amici Curiae* in Opp'n Pls.['] Mot. Prelim. Inj. at 6-9, *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (No. 12cv1034(JEB)(JRB)(RLW)).

B. Government has a compelling interest in fighting the reality and appearance of corruption to protect the integrity of democratic governance.

Contribution limits protect against *quid pro quo* corruption and the appearance thereof. As the Court

has continuously recognized, rules to fight the reality and appearance of corruption are necessary to protect the integrity of democratic government and the interests of its citizens. "Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest to justify political contribution limits." *McConnell v. FEC*, 540 U.S. at 143. The Court has consistently cited the danger that large contributions pose to representative government, recognizing that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential officeholders, the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. at 26-27; *see also FEC v. Colo. Federal Campaign Comm.* (*Colorado II*), 533 U.S. 431, 440-41 (2001) ("[L]imits on contributions are more clearly justified by a link to political corruption than limits on other kinds of . . . political spending are.").

The Court has written " . . . the primary interest served by the limitations . . . is the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Buckley*, 424 U.S. at 25. In upholding FECA's original contribution limits, the *Buckley* Court explained that:

> These limitations, along with the disclosure provisions, constitute the Act's primary weapons against the reality or appearance of improper influence stemming from the

> dependence of candidates on large campaign contributions. The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging upon the rights of individual citizens and candidates to engage in political debate and discussion.

Id. at 58.

Congress is also entitled to take into account the fact that experience "demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced. . . ." *Colorado II*, 533 U.S. at 446-47. The aggregate contribution limits serve to alleviate the threat of corruption arising from solicitations of multiple donations from one big donor.

While the prospect of an individual contributing more than $3.5 million in a federal election, or candidates or officeholders soliciting hundreds of thousands of dollars from a single donor through joint fundraising committees, certainly raises the risk of actual corruption, government also retains a strong interest in deterring the appearance of corruption that such large contributions inevitably create. The Court has recognized that "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27.

A democratic government has not merely a compelling interest, but a responsibility, to prevent the loss of faith in government that is created by a regime of large individual contributions. The Court has wisely recognized that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative [g]overnment is not to be eroded to a disastrous extent.'" *Id.* (quoting *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)). As the Court has written, "in *Buckley v. Valeo*, we specifically affirmed the importance of preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption. These interests directly implicate 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process.'" *FEC v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982) (quoting *United States v. UAW-CIO*, 352 U.S. 567, 570 (1957)). *See also Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 194 n.15, 195 (1981) (noting that the *Buckley* Court upheld base and aggregate limits because "such limitations served the important governmental interests in preventing the corruption *or appearance of corruption* of the political process that might result if such contributions were not restrained" (emphasis added) (citing *Buckley v. Valeo*, 424 U.S. at 23-38)).

The Court should be wary of exacerbating fundraising dynamics that put pressure on representatives to favor the positions of those upon whom they rely for financial support. The Court recognized in *Citizens United v. FEC*, 558 U.S. 310, 361 (2010), that "[i]f elected officials succumb to improper influences . . . ; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences."

While in *Citizens United* Justice Kennedy wrote "the appearance of influence and access . . . will not cause the electorate to lose faith in our democracy," this was in the context of examining independent expenditures, "by definition . . . not coordinated with a candidate." *Id.* The Court has never doubted that direct financial relationships between supporters and candidates or parties present a serious risk of corruption and the appearance of corruption. In fact, the *Citizens United* Court made this precise distinction, stating that "[t]he BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money." 558 U.S. at 360-61 (citations omitted). The instant case, of course, is not about independent expenditures; it is in fact about the type of large direct contributions given by individual donors and solicited by candidates and officeholders

that characterized the "soft money" system that Congress acted through BRCA to end.

Invalidation of the current aggregate limits would allow a single individual to direct huge sums to federal candidates, committees, and parties in an election cycle, and allow candidates and officeholders to solicit such sums directly. Allowing such enormous contributions would give rise to the kind of improper influence over federal officeholders that undermines public confidence in government and its ability to be responsive to the citizenry as a whole. The Court has repeatedly relied on its finding that "[t]ake away Congress' authority to regulate the appearance of undue influence and 'the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.'" *McConnell*, 540 U.S. at 144 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000)).

II. THE EROSION OF PUBLIC CONFIDENCE IN GOVERNMENT STEMMING FROM CONTRIBUTIONS THAT CREATE THE APPEARANCE OF CORRUPTION IS A SERIOUS, AND NOT A SPECULATIVE, CONCERN.

Appellants ask this Court to strike aggregate contribution limits at a particularly inopportune time. Even with these limits in place, significant majorities of Americans express the concern that the actions of their government are responsive to the wishes of financial supporters; that their government

does not represent their interests or respond to the needs of the broad populace anymore; and that this reflects a corruption of government and its ability to serve the public. The legal scholar Robert Post describes "the growing fear that our elections are increasingly failing to fulfill their democratic task, and that as a consequence the successful legitimation of our constitutional government may be slipping from our grasp." Robert Post, *Campaign Finance Regulation and First Amendment Fundamentals*, in *Money, Politics, and the Constitution: Beyond Citizens United* 11, 18 (M. Youn, ed. 2011).

A. Americans' confidence in government is at an all-time low.

Where the public believes that government is corrupt, we can expect to see an erosion of "confidence in the system of representative government." *See Buckley*, 424 U.S. at 26-27.

Since 1958, the National Election Survey has included three questions that pertain to corruption in government. Survey administrators use these questions to calculate the Trust in Government Index, which measures Americans' faith in government on a one to 100 scale. In 2008, the last year for which the Trust in Government Index is available, the Index

tied with its prior (1994) low of 26. Since then the indicia that make up the Index have all declined.[3]

Further, the public has the lowest level of confidence in Congress on record. A majority, 52%, has little or no confidence in Congress. This is the lowest level of confidence *for any institution* on record since Gallup began asking this question in 1973. Elizabeth Mendes & Joy Wilke, Gallup, *Americans' Confidence in Congress Falls to Lowest on Record*, Gallup Poll (June 13, 2013).[4]

---

[3] Am. Nat'l Election Studies, *User's Guide and Codebook for the Preliminary Release of the ANES 2012 Time Series Study* 451, 454, 455, 489 (July 1, 2013) [hereinafter *NES 2012 Dataset*], *available at* http://www.electionstudies.org; *see also* Am. Nat'l Election Studies, *The ANES Guide to Public Opinion and Electoral Behavior*, tbl.5A.5, *available at* http://www.electionstudies.org/nesguide/toptable/tab5a_5.htm (last visited July 12, 2013). For example, in 2008 69% of Americans agreed with the statement that the "government is pretty much run by a few big interests looking out for themselves" as opposed to being "run for the benefit of all the people." By 2012, the percentage of Americans believing government is run by a few big interests looking out for themselves had shot up ten points, to 79% of Americans; the share of Americans who thought that our government is run for the benefit of all had fallen from 29% in 2008 to only 19% in 2012. Voters' responses to other questions making up the indicia show similar changes. In 2008, 51% of voters thought "quite a few" of the people running the government are crooked. In 2012, that figure rose to almost 60%. In 2008, 25% said that they trust Congress to do the right thing "most of the time," dropping to only 5.7% in 2012. *Id.*

[4] *Available at* http://www.gallup.com/poll/163052/americans-confidence-congress-falls-lowest-record.aspx. The public's rate of confidence in the institutions polled was: the military (76%);

(Continued on following page)

Americans do not just have low confidence in government generally; this lack of confidence is driven by specific concerns about corruption. Six out of ten Americans worry very or fairly often about corruption of government, and another quarter worry about it occasionally. Liz Kennedy, *Citizens Actually United: The Overwhelming, Bi-Partisan Opposition to Corporate Political Spending and Support for Achievable Reforms*, Dēmos 4 (Oct. 25, 2012) [hereinafter L. Kennedy].[5] Taken together, 86% of Americans are worried about corruption of our government. *Id.* Similarly, 82% of Americans are very often, fairly often, or occasionally worried about special interests buying elections. *Id.*

B. Americans believe their elected representatives are more responsive to financial supporters than to constituents or the public interest.

"Democracy is premised on responsiveness." *Citizens United*, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 297 (Kennedy, J., concurring in part and

---

small business (65%); the police (57%); church or organized religion (48%); presidency (36%); medical system (35%); U.S. Supreme Court (34%); public schools (32%); criminal justice system (28%); banks (26%); television news (23%); newspapers (23%); big business (22%); organized labor (20%); health maintenance organizations (19%); Congress (10%). *Id.*

[5] *Available at* http://www.demos.org/sites/default/files/publications/CitizensActuallyUnited_CorporatePoliticalSpending.pdf.

dissenting in part)). However, "[i]f elected officials succumb to improper influences . . . ; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences." *Id.* at 310.

There is striking evidence that Americans believe that "politicians [are] too compliant with the wishes of large contributors." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 389 (2000) (citing *Buckley*, 424 U.S. at 28). Sixty percent of Americans say members of Congress are more likely to vote in a way that pleases their financial supporters, while only 20% think representatives will vote in the best interests of their constituents. Memorandum from Celinda Lake et al., Lake Research Partners & Brian Nienaber & Ashlee Rich, Tarrance Group, *National Polling on Support for a Proposal to Tackle Big Money in Congressional Elections* 2 (Feb. 1, 2009) [hereinafter *Lake/Tarrance Poll*].[6] Two-thirds of Americans do not think that voters and donors have the same access and influence on candidates. *See* Brennan Ctr. for Justice, *National Survey: Super PACs, Corruption, and Democracy* 2 (Apr. 24, 2012).[7]

---

[6] *Available at* http://www.acrreform.org/wp-content/uploads/2011/05/Fair-Elections-Polling-2.6.09.pdf.

[7] *Available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/CFR/SuperPACs_Corruption_Democracy.pdf.

A recent study found that "[v]oters are deeply concerned that all of this money purchases influence in Congress and drowns out the voices of ordinary voters. When asked who has the most influence on Congressional votes, the views of constituents ranked at the bottom of the list, while 59 percent of voters said 'special interest groups and lobbyists' and almost half (46 percent) said campaign contributors." Greenberg Quinlan Rosner Research, *Voters Push Back against Big Money Politics*, Democracy Corps Nat'l Surveys 1 (Nov. 13, 2012).[8]

"Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder." *McConnell*, 540 U.S. at 153. This entails "a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985).

These dangers are not imaginary, but real. For example, former Senator Wyche Fowler described succumbing to influence from business interests who were constantly asking for special provisions in the

---

[8] *Available at* http://www.democracycorps.com/attachments/article/930/dcor.pcaf.postelect.memo.111312.final.pdf.

tax code when he was on the Ways and Means Committee: "I am sure that on many occasions – I'm not proud of it – I made the choice that I needed this big corporate client and therefore I voted for, or sponsored its provision, even though I did not think that it was in the best interests of the country or the economy."[9]

C. Americans believe that government's differential response to wealthy donors is caused by the corrupting influence of large contributions.

Professor Samuel Issacharoff describes the danger that "the electoral system leads the political class to offer private gain from public action to distinct, tightly organized constituencies, which in turn may be mobilized to keep compliant public officials in office." Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118, 126 (2010). Those in positions of economic power can use their financial resources to support the election efforts of favored politicians to keep their power; elected officials can use their political power to further the economic interests of their financial supporters. A vicious cycle can form where the economic and political power that each group

---

[9] Martin Schram, *Speaking Freely: How Congress is Compromised in the Great Money Chase, Center for Responsive Politics* 28 (1995). Senator Wyche's observation is just one of many similar observations documented in *Speaking Freely*.

helped the other attain can be used to retain those gains.

Professor Issacharoff identifies the danger as "the potential private capture of the powers of the state," and reminds us that

> [t]he American recognition of the risk of legislation in the private interest dates at least to *The Federalist No. 10*, in which Madison identified as a central problem of republican governance the ability to resist 'a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.'

Id. at 129 (quoting James Madison, *The Federalist No. 10*, in *The Federalist Papers* 72 (Clinton Rossiter ed., 2003)).

This is in fact what the public sees in our modern democracy. Americans believe that large financial contributions are the reason their representatives are more responsive to private interests with financial resources than to the public interest. Seventy-three percent of voters thought that the influence of campaign money given to members of Congress was a "major factor in causing the current financial crisis on Wall Street." *Lake/Tarrance Poll*, at 2. They thought large campaign contributions from the banking industry led to lax oversight of the industry. This was true for three out of four Democrats (76%) and Republicans (74%). *Id.* And, Americans recently reported

feeling that the federal government "is so corrupted by big banks, big donors, and corporate lobbyists that it no longer works for the middle class." Greenberg Quinlan Rosner Research, *Money in Politics is a Ballot Box Issue*, Democracy Corps Nat'l Surveys 1 (May 9, 2012) [hereinafter *Money in Politics Survey*].[10]

Americans fear that improper influence from private economic interests is preventing government from acting to address their real problems. Almost eight in ten Americans agree with the statement "I am worried that large political contributions will prevent Congress from tackling the important issues facing America today, like the economic crisis, rising energy costs, reforming health care, and global warming." Common Cause, *Fair Elections Poll, Money in Politics* (Feb. 2009).[11]

And citizens see this improper influence as corruption. "Eighty-five percent of Americans call it corruption when financial supporters have more access and influence with members of Congress than average Americans," and "fifty-seven percent say this is very corrupt." L. Kennedy, *supra*, at 3.

Such findings present a serious challenge, because "[c]itizen distrust in the democratic process

---

[10] *Available at* http://www.democracycorps.com/attachments/DCorps_PCAF_memo_FINAL.pdf.

[11] *Available at* http://www.commoncause.org/atf/cf/{fb3c17e2-cdd1-4df6-92be-bd4429893665}/POLLING%20MEMO%20FEB%202009%20FINAL.PDF.

threatens the health of a democracy." Molly J. Walker-Wilson, *Financing Elections and "Appearance of Corruption": Citizen Attitudes and Behavior in 2012* 37 (*St. Louis Univ. Legal Studies Research Paper Series*, No. 2013-14, 2013) (examining how appearance of corruption undermines Americans' sense of political efficacy and deters civic participation).[12] Striking the aggregate limits and unleashing direct contributions of more than $3.5 million by one individual can only deepen the public's already strong concerns about the integrity of their government.[13]

---

[12] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231695.

[13] Professors Nathanial Persily and Kelli Lammie question the notion that the public perception of corruption is correlated with the "activity taking place in the campaign finance system." Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Penn. L. Rev. 119, 123 (2004). They recognize, however, that "the inability of the campaign finance system to affect such perceptions might be a product of the constraints placed by the jurisprudence itself." *Id.* They also note that "[i]n the end, we must admit that large shares of the American population distrust their government and believe the campaign finance system is a source of undue influence." *Id.* at 174. It also follows that, while current levels of confidence in government are uncomfortably low, they could be worse if the few protections fighting the reality and appearance of corruption were not in place or were dismantled.

III. AMERICANS' CONCERNS ABOUT DONORS' IMPROPER INFLUENCE OVER GOVERNMENT ARE JUSTIFIED AND NOT SPECULATIVE.

As the preceding discussion has shown, Americans are deeply concerned that their elected officials do not respond to the needs of their constituents or the public interest as a whole, but instead to the interests of the largest donors – implicating the very corruption danger the Court's precedents have identified. *See, e.g., McConnell*, 540 U.S. at 187. Examining three related empirical questions sheds light on whether Americans' concerns are grounded in reality: (1) do the policy preferences of those able to make large donations actually differ in significant ways from those of other Americans; (2) do such donors dominate campaign funding such that we should expect candidates to privilege their policy preferences; and (3) is government in fact more responsive to the wishes of those with more economic clout?

Answering these empirical questions is important for understanding the compelling nature of the interests served by the limits on aggregate contributions at issue in this case. After all, if the wealthier Americans who are able to make large donations held substantially the same views as the general public, then their outsized influence on government policy might matter less because it would not skew policy outcomes in a particular direction. Similarly, if there were no evidence that government policies actually respond more strongly to the preferences of those who

fund campaigns, then again, the public's concern about this might appear less compelling.

The answers, however, are clear, and show that Americans' concerns about the capture of their government by financial supporters are justified and not imaginary. Important research confirms that the people who have the financial resources to provide major funding to political campaigns have systematically different policy preferences than the general public, especially on economic issues; that contributions from just a tiny subset of Americans disproportionately dominate campaign funding; and that our government responds differentially – often dramatically so – to the policy preferences of the wealthy. It is this reality that creates a substantial and realistic appearance of corruption, and is a driving force behind the dismal figures reported in the previous section regarding public confidence in our electoral system and public institutions.

A. The policy preferences of those who can make large donations differ greatly from those of ordinary Americans.

A substantial body of research documents the differing preferences of the wealthy from the general public on many important policy issues.[14] One of the

---

[14] *Amici* discuss the preferences of the wealthy here not because they are concerned with the opinions of wealthy Americans *per se*, but because these preferences serve as a reasonable

(Continued on following page)

most revealing recent studies is *Democracy and the Policy Preferences of Wealthy Americans*, carried out in 2011 by political science scholars Benjamin I. Page, Larry M. Bartels, and Jason Seawright. Their study gives an unprecedented window into the opinions of the very wealthy and how they differ from those of other Americans. *See generally* Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 Persp. On Pol. 51 (2013) [hereinafter *Policy Preferences*].[15]

The authors of *Policy Preferences* find that the preferences of the very rich differ substantially from those of the general public – especially on key questions about how to structure the economy and respond to America's economic needs. One example concerns the central question of how government should prioritize job creation as compared to reducing the nation's budget deficit. In polls conducted over the past several years, the general public has been consistently more concerned with job creation and

---

proxy for the views of those who make the large political contributions at issue in this case. As shown below, evidence confirms the twin common-sense notions that large donors are more likely than non-donors or small donors to be wealthy and that wealthy Americans are more likely than other citizens to be large donors.

[15] The study is based on interviews of a representative sample of respondents in the Chicago metropolitan area corresponding to the top 1% of American wealth-holders. Interviewees had a mean wealth of $14.0 million, a median wealth of $7.5 million and an average yearly income of slightly more than $1 million. *Id.* at 53.

economic growth than with reducing the deficit, often by two-to-one margins or more. David Callahan & J. Mijin Cha, *Stacked Deck: How the Dominance of Politics by the Affluent and Business Undermines Economic Mobility in America*, Dēmos 5-6 & 5 tbl.1 (2013).[16]

In contrast, when the high-wealth interviewees in the *Policy Preferences* study were asked to name the most important problem facing the country, "[o]ne third (32 percent) of all open-ended responses mentioned budget deficits or excessive government spending, far more than mentioned any other issue." *Policy Preferences*, *supra*, at 55. By comparison, unemployment and education "was mentioned as the *most* important problem by only 11 percent, indicating that they ranked a distant second and third to budget deficits among the concerns of wealthy Americans." *Id.*

This disparity concerning the importance of the deficit is not an aberration. The *Policy Preferences* study finds significant differences across a range of issues related to economic well-being and the role that government should play in the economy. This is particularly true for policy preferences regarding the government's role in encouraging job creation and employment. A full two-thirds (68%) of the general public believes that "the government in Washington

---

[16] *Available at* http://www.demos.org/sites/default/files/publications/Demos-Stacked-Deck.pdf.

ought to see to it that everyone who wants to work can find a job." *Id.* at 57 tbl.5. But among the wealthy respondents in the *Policy Preferences* study, only 19% agreed with that statement – more than a three to one disparity. *See id.*

Similarly, 78% of the public supports a minimum wage high enough that no family with a full time worker falls below the poverty line, while only 40% of the wealthy agree. A majority (53%) of the public believes that "the federal government should provide jobs for everyone able and willing to work who cannot find a job in private employment," but only 8% of wealthy respondents agree. *Id.*

The *Policy Preferences* authors also find that its respondents were far more likely to favor cutting spending on programs such as Social Security, Food Stamps, and health care than was the general public, which instead would prefer to see expanded government spending on such programs. *Id.* at 56-57 & 56 tbl.4.

The *Policy Preferences* findings are particularly important because the authors were able to isolate policy views among a highly affluent group of Americans corresponding roughly to the top 1% – extending previous research that had compared policy differences among more broadly defined wealth categories. *See* Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* 2-3, 70-96 (2012) (defining "affluent" as Americans at 90th

income percentile – the top 10% – earning at least $135,000 per year in 2010, and still finding significant differences in public opinion based upon wealth). Taken together, this is exactly the segment of the population that has the capacity to contribute large sums to political candidates, parties, and committees.

B. The largest contributors already dominate the funding of U.S. elections.

Candidates for federal office are heavily dependent on campaign contributions from individuals. Adam Lioz & Blair Bowie, *Billion Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections*, Dēmos 12-13 (2013) [hereinafter *Billion Dollar Democracy*].[17] Even with current limits on contributions in place, those who make the largest contributions provide candidates with a huge percentage of their overall funds. Data compiled by the Sunlight Foundation shows that in the 2012 elections, over a quarter of all of the identifiable political contributions to any candidate, party, committee, or group came from just 31,385 people. This number represents just one ten-thousandth of the U.S. population. Lee Drutman, Sunlight Foundation, *The Political 1% of the 1% in 2012*, Sunlight Foundation Blog (June 24,

---

[17] *Available at* http://www.demos.org/sites/default/files/publications/BillionDollarDemocracy_Demos.pdf.

2013, 9:00 AM).[18] The impact of this tiny cohort of the American public was so great that "not a single member of the House or Senate was elected without financial assistance from this group." *Id.*

The relative influence of this elite group is clear: 84% of members elected to the House of Representatives in 2012, and more than half of the members of the Senate, received more money from the 1% of the 1% *than from all their small donors combined. Id.* Other data show that candidates for the U.S. Senate in 2012 raised 64% of their funds in contributions of at least $1,000, from just 0.04% of the U.S. population. *Billion Dollar Democracy*, *supra*, at 13 fig.17. Indeed, in the 2012 elections "candidates got more money from a smaller percentage of the population than any year for which we have data." Sunlight Foundation, *supra*.

Survey evidence also confirms – not surprisingly – that the affluent are far more likely to make financial contributions than are other Americans. The *Policy Preferences* study described above finds that a full two-thirds (68%) of the wealthy respondents had made political contributions in the previous 12 months. *Policy Preferences*, *supra*, at 54 & 54 tbl.2. This compares with just 0.4% of the American population who made a disclosed federal contribution in 2012. Center for Responsive Politics, *Donor*

---

[18] *Available at* sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct/.

Demographics, OpenSecrets.Org (last visited July 19, 2013).[19] Moreover, as the authors of the study note, "A remarkable 21 percent of our wealthy respondents solicited or 'bundled' other peoples' political contributions – not an activity that is common among ordinary citizens." *Policy Preferences*, *supra*, at 54.[20]

The income gap in who makes campaign donations is accompanied by a racial gap as well. A study of the 2004 Presidential election is illustrative. In that campaign, the top-contributing zip code (located on Manhattan's Upper East Side) was 86.4% white. This one zip code, home to fewer than 100,000 voting age residents, generated more campaign dollars than the 377 U.S. zip codes with the largest percentage of African Americans, home to 6.9 million voting age residents; as well as the 365 zip codes with the largest percentage of Hispanic residents, with 8.1 million adults. Public Campaign, *Color of Money: The 2004 Presidential Race* 3-4 (2004).[21]

---

[19] *Available* at http://www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012.

[20] In addition, a nationwide survey found that 81% of those who gave contributions of at least $200 during the 1996 congressional elections reported annual family incomes greater than $100,000. John Green, et al., *Individual Congressional Campaign Contributors: Wealthy, Conservative, and Reform-Minded* (1998).

[21] *Available at* http://library.publicampaign.org/sites/default/files/2004_cofm_pres_complete.pdf.

Further, "[t]he nation's biggest campaign donors have little in common with average Americans. They hail predominantly from big cities, such as New York and Washington. They work for blue-chip corporations, such as Goldman Sachs and Microsoft. One in five works in the finance, insurance and real estate sector. One in ten works in law or lobbying." Sunlight Foundation, *supra*. The median aggregate contribution from this elite group was $26,584; this is more than half the median family income in the United States. *Id.*

U.S. Senator Chris Murphy has provided insight on how the need to solicit donations from those with ample financial resources can affect officeholders. He recently described the four to six hours per day he was required to spend calling potential donors in order to raise campaign funds and noted that when making fundraising appeals, he "would not call anyone who could not drop at least $1,000," people he estimated make at least $500,000 to $1 million per year. Paul Blumenthal, *Chris Murphy: 'Soul-Crushing' Fundraising Is Bad for Congress*, Huffington Post (May 7, 2013, 5:40 PM).[22]

> I talked a lot more about carried interest inside of that call room than I did in the supermarket . . . [The people I'm calling] have fundamentally different problems than other

---

[22] *Available at* http://www.huffingtonpost.com/2013/05/07/chris-murphy-fundraising_n_3232143.html.

> people. And in Connecticut especially, you spend a lot of time on the phone with people who work in the financial markets. And so you're hearing a lot about problems that bankers have and not a lot of problems that people who work at the mill in Thomaston, Conn., have. You certainly have to stop and check yourself.

Id.

The record in *McConnell*, which addressed the soft-money system that would be largely recreated by striking the aggregate limits, was replete with similar evidence of how public policy can be shaped by the corrupting influence of such large contributions. Former Senator Alan Simpson testified that "Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising." *McConnell v. FEC*, 251 F. Supp. 2d 176, 481 (D.D.C.) (Kollar-Kotelly, J., concurring in part and dissenting in part), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003). Former Senator Paul Simon recounted how Federal Express obtained a favorable amendment to a bill without even a hearing after contributing $1.4 million to incumbents and almost $1 million in soft money contributions to political parties. One of his senior colleagues brushed back objections by explaining "we've got to pay attention to who is buttering our bread." *Id.* at 482.

C. Public policy outcomes in the U.S. are strongly responsive to the preferences of the affluent, even when those preferences diverge markedly from those of the general public.

The differing policy preferences of the wealthy as compared to the general public would not present a challenge to the democratic vision of a representative government if the actual influence of the wealthy on public policy accorded with their numbers. The top one percent – or one tenth of one percent – of Americans may desire very different outcomes than the broad public; but by definition they are a tiny segment of the electorate, and could not improperly sway policy outcomes by their numbers alone in a democracy guided by the principle of one person, one vote.

Increasing evidence, however, challenges this core assumption of democratic governance in the U.S. It is no new observation that in fact the cohort of Americans that contribute large sums to federal campaigns exerts a strong influence on the political process and public policy outcomes. But, the degree of influence that has been documented in recent studies should be sobering to anyone concerned with the health of our democracy – and should give substantial pause in considering Appellants' demand to unleash the potential for contributions of more than $3.5 million by a single individual in federal elections. *Cf. Citizens United*, 558 U.S. at 361 (supporting government's efforts to dispel the appearance or reality of "elected officials succumb[ing] to improper

influences; . . . surrender[ing] their best judgment; and . . . put[ting] expediency before principle.").

In *Affluence and Influence*, Professor Gilens set out to measure what he calls the "preference/policy link" across the economic spectrum. Gilens, *supra*, at 70-97. His research examines the extent to which the policy preferences of different income groups are reflected in actual policy outcomes in the United States. His findings present a direct challenge to the notion that American democracy ensures policy outcomes that represent the views of the broad citizenry. Gilens writes:

> The American government does respond to the public's preferences, but that responsiveness is strongly tilted toward the most affluent citizens. Indeed, under most circumstances, the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn't adopt . . . The complete lack of government responsiveness to the preferences of the poor is disturbing and seems consistent only with the most cynical views of American politics . . . median-income Americans fare no better than the poor when their policy preferences diverge from those of the well-off.

Id. at 1, 81.

Professor Gilens continues by describing explicitly the power of the preferences of the affluent to

override those of the much more numerous poor and middle class:

> . . . for Americans below the top of the income distribution, any association between preferences and policy outcomes is likely to reflect the extent to which their preferences coincide with those of the affluent . . . We saw above that less-well-off Americans have little influence over policy outcomes when their preferences diverge from those of the affluent. [Additional data described] show that this is true not only for the poor and the middle class considered separately . . . but for those policies on which the poor and middle class are closely aligned in opposition to the affluent.

Id. at 83-84.[23]

This is a remarkable finding that challenges the vision of American democracy in which government responds to the will of the majority: when the preferences of the wealthiest 10% of Americans conflict with those of the rest of the population, the 10% trumps the 90%. It underscores why Americans are so deeply concerned that campaign funding prevents

---

[23] While the preferences of the affluent are quite dominant across the board, the divergence of influence is not equal across policy domains. Professor Gilens finds that "the starkest difference in responsiveness to the affluent and the middle class occurs on economic policy, a consequence of high-income Americans' stronger opposition to taxes and corporate regulation. . . ." *Id.* at 101.

their elected officials from acting in the interests of their constituents, *see supra* Section II. In the end, Professor Gilens' exhaustive study of the "preference/policy" link in the United States leads him to some stark conclusions about the state of American democracy. He writes that "[t]he patterns of responsiveness found in previous chapters often correspond more closely to a plutocracy than to a democracy." *Id.* at 234.

Professor Gilens is by no means alone in his conclusions. Political scientist Larry Bartels also finds that, in contrast to the affluent, low-income Americans have little influence over policy outcomes. As he writes in his 2008 study, *Unequal Democracy: The Political Economy of the New Gilded Age*: "The preferences of people in the bottom third of the income distribution have no apparent impact on the behavior of their elected officials." Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* 285 (2008).

Professors Gilens' and Bartels' findings are particularly troubling in light of the demographic characteristics of the bottom third of the income distribution in the U.S. As noted in a recent Dēmos report, over half of African American households and 45% of Latino households are in the lowest third of income distribution in the U.S. These researchers' findings thus suggest that the majority of African Americans and nearly half of Latinos earn too little for their views to have any impact on the behavior of elected officials. *See* Callahan & Cha, *supra*, at 21.

Professor Gilens notes that the influence of the wealthiest Americans on policy outcomes seems to be increasing. "The analyses of change over time" he notes "do reveal an important general trend: the strengthening of policy responsiveness for affluent Americans." Gilens, *supra*, at 193. This is important because it suggests that government's skew toward the policy preferences of the affluent is not an immutable reality, but rather may be responsive to changes in opportunities for influence, as well as particular policy or economic conditions, over time. *Id.*

The realities illuminated by the above research fuel the public perception of corruption and certainly give rise to significant fears about "real or imagined coercive influence of large financial contributions on candidates' positions. . . ." *Buckley*, 424 U.S. at 25.[24]

---

[24] The concern discussed in this brief regarding the potential harm of unleashing huge financial contributions in federal elections is centered wholly on the role of such contributions in increasing the potential for corruption and the public's loss of faith in the integrity of government. Appellants have argued that aggregate limits cannot be supported by a desire to protect one set of contributors "from the possibility that others will make larger contributions[,]" *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981) (addressing ballot measure campaigns), which they see as an impermissible demand for equalizing the voices of all donors. The argument in this brief is based on an entirely different rationale – it is based directly on the concern about the reality and appearance of corruption stemming from large contributions in candidate elections that would be unleashed by striking the aggregate limits, and how such large contributions would contribute to the erosion of citizens' faith in government.

IV. STRIKING THE AGGREGATE LIMITS WILL INCREASE THE DANGER OF CORRUPTION AND AGGRAVATE THE APPEARANCE OF CORRUPTION.

The preceding discussion demonstrates the public's eroding confidence in the ability of government to respond to important public needs and to resist the improper influence of campaign money on policymaking. This phenomenon is driving a significant percentage of the public away from political engagement. Even in 2008, an election with record turnout, 80 million eligible persons failed to participate. Susan Page, *Why 90 Million Americans Won't Vote in November*, USA Today, Aug. 15, 2012, at A1 (reporting on Suffolk University/USA Today poll).[25] In a poll of eligible persons who stated that they were unlikely to vote, when asked why they did not pay attention to politics, 54% said, "[i]t is so corrupt." *Id.* As citizens lose faith in government, levers of democratic accountability are dismantled, and we lose the wisdom of the larger electorate in determining the direction of our nation.

Striking aggregate contribution limits – which would allow a single donor to funnel more than $3.5 million directly into federal election campaigns and allow candidates or officeholders to solicit huge sums – would alter our political system in exactly the way that is most likely to further erode confidence in

---

[25] *Available at* http://usatoday30.usatoday.com/news/politics/story/2012-08-15/non-voters-obama-romney/57055184/1.

government and foster the appearance of corruption, perhaps "to a disastrous extent." *Buckley*, 424 U.S. at 27 (quoting *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973)). The evidence suggests that removing these generous caps will lead to an even greater gulf between the policy choices of government and the preferences of ordinary citizens – fueling cynicism, depressing political engagement, and leading even more citizens to conclude (apparently accurately) that government is more responsive to a narrow set of donors than to the broad populace.

Americans' current perception of corruption in government and lack of faith in public institutions such as Congress already presents a challenge to the legitimacy of our democracy. When most Americans already believe that government is run by a few big interests instead of for the benefit of all people, our democracy cannot abide further erosion of the campaign finance limits that are the government's most effective tool in deterring corruption and its appearance. *NES 2012 Dataset*, *supra*, at 454. Sixty percent of Americans already believe that "public officials do not care what the people think." Am. Nat'l Election Studies, *The ANES Guide to Public Opinion and Electoral Behavior*, tbl.5B.3 (last visited July 12, 2013).[26] How will our Republic fare if that figure continues to rise?

---

[26] *Available at* http://www.electionstudies.org/nesguide/toptable/tab5b_3.htm.

Finally, in striking aggregate limits, this Court would contribute to public disenchantment with government by stripping the state of a popular and effective tool. Despite their concerns about the impact of campaign money on the integrity of their government, Americans have not given up on the belief that limiting the size of contributions is an important answer. Nearly three-quarters (73%) of all voters believe there should be common-sense limits on the amount of money people can contribute to political campaigns. *Money in Politics Survey*, *supra*, at 1. Of that group, a large majority (59%) is "intensely committed" to such limits. *Id.* A large majority (60%) says "candidates ought to tackle money in politics in order to make government work for the middle class." *Id.*

Faith in government and its legitimacy is a first principle. In its seminal campaign finance case, this Court recognized that where the public believes that government is corrupt, we can expect to see an erosion of "confidence in the system of representative government." *See Buckley*, 424 U.S. at 26-27. We are seeing just that right now. Although the full cure for this problem lies outside the confines of this particular case, this case does present the Court with a compelling need to do no harm, to not make matters worse.

The U.S. Government has a compelling interest and an obligation to protect its legitimacy. This Court should defer to the judgment of Congress that the aggregate limits are a necessary means to that end, and are critical to prevent further erosion of citizens'

confidence in government. The limits on aggregate contributions reflect Congress' well-grounded judgment that limits are necessary to deter the reality and appearance of corruption that are so corrosive to citizens' faith in government. The Court has "understood that such deference to legislative choice is warranted particularly when Congress regulates campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption. . . ." *Beaumont*, 539 U.S. at 155 (citing *Buckley*, 424 U.S. at 26-28). This Court should respect Congress' judgment, prior precedent, and current political reality by upholding aggregate contribution limits.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

BRENDA WRIGHT
Counsel of Record
DEMOS
358 Chestnut Hill Ave.
Suite 303
Brighton, MA 02135
(617) 232-5885
bwright@demos.org

ELIZABETH KENNEDY
ADAM LIOZ
DEMOS
220 Fifth Ave.
2nd Floor
New York, NY 10001
(212) 633-1405

Counsel for Amici Curiae

APPENDIX

ORGANIZATIONAL DESCRIPTIONS OF *AMICI CURIAE*

The Communications Workers of America, AFL-CIO ("CWA"), is an international labor organization representing over 700,000 workers and retirees throughout the United States, Puerto Rico and Canada. CWA members work in the telecommunications, print and broadcast media, airline, transportation, manufacturing, education and health care industries and in a wide variety of public sector public service jobs. CWA and the workers it represents are actively involved in efforts to achieve a more democratic and accountable government that responds to the needs of working families and ordinary citizens. CWA has been a longstanding advocate for campaign finance reform, including efforts to eliminate the inappropriate and destructive influence of large financial contributions on the democratic political process.

Greenpeace was founded in 1971 and, with more than 300,000 financial supporters in the U.S. alone, is the largest independent global environmental organization in the world that defends the natural world and promotes peace by investigating, exposing and confronting environmental abuses in non-violent ways, while championing environmentally responsible solutions. Greenpeace has an interest in campaign finance reform because of the undemocratic influence that large polluters can wield over environmental

policy and the election process by making large campaign contributions.

Founded in 1909, the National Association for the Advancement of Colored People (hereinafter the "NAACP" or the "Association") is the nation's oldest and largest civil rights organization. The mission of the NAACP is to ensure the political, educational, social and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. The fundamental goal of the NAACP's voting rights advocacy is to ensure that every American will have free, open, equal, and protected access to the vote and fair representation at all levels of the political process. The NAACP has been at the forefront of the effort to increase minority non-partisan participation and civic engagement. The Association has fought to protect ordinary citizens' right to bring their interests and concerns before their elected officials. The NAACP views campaign finance as an important civil rights issue.

The Sierra Club is a national nonprofit organization of approximately 600,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Sierra Club's members need a political system that is responsive to citizens to effectively advocate for policies that reflect their environmental

priorities. The Club's particular interest in this case stems from its members' belief and concern that large financial contributions to political candidates impede their efforts and endanger our democracy.

The American Federation of Teachers (AFT), founded in 1916, today represents more than 1.5 million educators and school personnel, healthcare and childcare providers, and other professionals. AFT is committed to advancing the principles of fairness, democracy and economic opportunity, as well as high-quality public education, healthcare and public services, through political activism, community engagement, organizing, collective bargaining and the work our members do. AFT supports strong campaign finance laws to safeguard the voices of our members, their families, and their communities through greater fairness, openness and participation in elections.

The Main Street Alliance (MSA) is a national network of state and locally based small business coalitions that together represent over 12,000 small business owners nationwide. MSA creates opportunities for Main Street small business owners to speak for themselves on issues that impact their businesses and local economies. MSA's small business members believe allowing big contributors to dominate the funding of campaigns for public office threatens to tilt the economic playing field against small businesses, replacing honest competition – competition based on quality, value and service – with distorted markets influenced by pay to play politics. With large campaign contributions threatening to put small businesses at

a serious disadvantage in the marketplace, MSA strongly opposes efforts to strike aggregate contribution limits.

OurTime.org is a nationwide non-partisan, non-profit organization that leverages online organizing, new media, and popular culture to enhance the political voice of young Americans. More than one million members strong, OurTime.org leads campaigns that register voters, remove ballot barriers, and highlight relevant news and policies that will impact this generation's lives. All too frequently, young Americans are overlooked in election cycles because they lack the fiscal resources to demand the time and attention of candidates. Representing this growing demographic of voters, OurTime.org is especially concerned with keeping the democratic process fair and accountable for all citizens.

People For the American Way Foundation ("PFAW Foundation") is a nonpartisan, non-profit citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1981 by a group of religious, civil and educational leaders, PFAW Foundation now has over 575,000 members and supporters nationwide who are dedicated to the democratic traditions embodied in this country's Constitution. PFAWF is committed to promoting values and institutions that sustain a diverse democratic society and an informed and participatory electorate, and our efforts include defending the right to vote and opposing measures that damage a functioning democracy.

Rock the Vote is a national, non-partisan organization with 1.5 million members dedicated to engaging young people ages 18-29 in our nation's democracy. For more than two decades, Rock the Vote has used pop culture, technology, and grassroots organizing to register more young people to vote than any other organization or campaign – including more than a million people in the 2012 elections. A critical part of Rock the Vote's work to increase civic engagement amongst young people is advocating for voting and campaign finance laws that restore the Millennial generation's belief that our democracy can be responsive to its people and give our members – and all Americans – faith that their interests are being represented by those they elect.

U.S.PIRG, the federation of state Public Interest Research Groups (PIRGs), stands up to powerful special interests on behalf of the American public and our tens of thousands of members, working to win concrete results for our health and our well-being. With a strong network of researchers, advocates, organizers and students in state capitals across the country, we take on the special interests on issues such as product safety, public health, political inequality, tax and budget reform and consumer protection, where these interests stand in the way of reform and progress. U.S.PIRG has been a long-standing advocate for campaign finance reform, working to eliminate the undue influence of big money in our elections and ensure that every citizen has a meaningful voice in our democratic process.

Working Families Organization (WFO) is a network of state-based progressive coalitions committed to a fair economy and a real democracy that works for everyone – not just the wealthy and well-connected. Formed by community organizations, neighborhood activists, and labor unions, WFO represents affiliated organizations in New York, Connecticut, New Jersey, Maryland, DC, and Oregon as well as more than 430,000 individual supporters throughout the country. WFO has spent years fighting to remove the corrosive influence of money in politics and to empower working class and middle class families to have control over decisions that impact their lives at the local, state, and federal levels.

Dēmos is a national public policy center working for an America where we all have an equal say in our democracy and an equal chance in our economy. Removing barriers to political participation and ensuring full representation of America's diverse citizenry are central to Dēmos' mission. Dēmos engages in litigation, research and advocacy to support campaign reforms that protect the integrity of government and ensure that the voices of citizens can be heard.

AMICUS CURIAE BRIEF

No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON, ET AL.,
Appellants,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF DEMOCRATIC MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

PAUL M. SMITH
Counsel of Record
JESSICA RING AMUNSON
NEAL R. UBRIANI*
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

**Admitted only in New York; supervised by principals of the Firm*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. As a Matter of Stare Decisis, Relative Expertise, and Democratic Accountability, This Court Should Continue Its Deference to the Elected Branches on Contribution Limits. 4

A. Under *Buckley*, Deferential Review Applies to Contribution Limits Generally 4

B. The Aggregate Contribution Limits at Issue Here are Plainly Constitutional Under *Buckley*'s Deferential Standard of Review. 8

C. As a Matter of Relative Expertise and Democratic Accountability, the Judiciary Should Defer to the Elected Branches' Determination that Contribution Limits are Needed. 12

II. Contribution Limits in General, and Aggregate Contribution Limits in Particular, Remain Critical to Fighting the Actuality or Appearance of Corruption. 20

A. Contribution Limits are Justified by the Interest in Preventing Both the Actuality and the Appearance of Corruption..... 22

B. Aggregate Contribution Limits are a Necessary Part of the Closely Drawn System for Avoiding Corruption. 26

C. Aggregate Limits Also Prevent Institutional Corruption..... 31

CONCLUSION 34

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

California Medical Ass'n v. FEC, 453 U.S. 182 (1981) 22

Citizens United v. FEC, 558 U.S. 310 (2010) 7, 23, 24

Colegrove v. Green, 328 U.S. 549 (1946) 8

Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) ... 22, 23

Davis v. FEC, 554 U.S. 724 (2008) 4, 8, 16

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) 27

FEC v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001) 5, 7, 22, 23, 25, 26, 27, 29

FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) 14

McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003) 14, 21, 28, 33

McConnell v. FEC, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010) ..... *passim*

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 7, 17, 20, 22

Randall v. Sorrell, 548 U.S. 230 (2006) 5, 6, 8, 14, 15

Regan v. Time, Inc., 468 U.S. 641 (1984) 19

STATUTES AND REGULATIONS

2 U.S.C. § 441a(a)(4-5) 27

2 U.S.C. § 431(8)(B) 10

11 C.F.R. § 102.17 29

11 C.F.R. § 110.5 11

LEGISLATIVE MATERIALS

32 Congressional Quarterly Almanac 459 (1976) 14

120 Cong. Rec. 35,135-56 (1974) 17, 31

OTHER AUTHORITIES

2012 Top Overall Individual Contributors, OpenSecrets.org, http://www.opensecrets.org/overview/topindivs_overall.php (last visited July 22, 2013) 24

Associated Press National Constitution Poll, Sept. 17, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12.out_1447&type=hitlist&num=0 (last visited July 22, 2013) 18

CBS News / New York Times Poll, Jan. 18, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12.out_11751&type=hitlist&num=0 (last visited July 22, 2013) 18

Democracy Corps Poll, Nov. 9, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12.out_1453&type=hitlist&num=0 (last visited July 22, 2013) 18

Democracy Corps Poll, Nov. 9, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12.out_1455&type=hitlist&num=6 (last visited July 22, 2013) 25

Democratic Senatorial Campaign Cmte: Contributions to Candidates, OpenSecrets.org, http://www.opensecrets.org/parties/recipients.php?cycle=2012&cmte=DSCC (last visited July 22, 2013) 28

Lee Drutman, *The Political 1% of the 1% in 2012*, Sunlight Foundation Blog (June 24, 2013, 9:00AM), http://sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct/ 11

House Race Ratings, N.Y. Times, http://elections.nytimes.com/2012/ratings/house (last visited July 22, 2013) 32

Lawrence Lessig, *What an 'Originalist' Would Understand 'Corruption' to Mean*, Cal. L. Rev. (forthcoming 2013), *available at* http://ssrn.com/abstract=2257948 ..... 31, 32

Harold Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345 (1977) 12

National Republican Senatorial Cmte: Contributions to Candidates, OpenSecrets.org, http://www.opensecrets.org/parties/recipients.php?cmte=NRSC&cycle=2012 (last visited July 22, 2013) 28

David M. Primo et al., *State Campaign Finance Reform, Competitiveness, and Party Advantage in Gubernatorial Elections*, *in The Marketplace of Democracy* 268 (Michael P. McDonald & John Samples eds., 2006), *available at* http://www.campaignfreedom.org/doclib/20090916_Milyo2004GovStateElecs.pdf 16

Rasmussen Reports Poll, July 10, 2009, *available* at Polling the Nations, http://poll.orspub.com/document.php?id=quest09.out_14739&type=hitlist&num=0 (last visited July 22, 2013) 18

Rasmussen Reports Poll, July 10, 2009, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest09.out_14740&type=hitlist&num=1 (last visited July 22, 2013) 25

Senate Race Ratings, N.Y. Times, http://elections.nytimes.com/2012/ratings/senate (last visited July 22, 2013) 32

Spending in Key House and Senate Races, Wash. Post, Nov. 8, 2012, *available at* http://www.washingtonpost.com/wp-srv/special/politics/key-race-spending/ 25

The 2012 Money Race: Compare the Candidates, N.Y. Times, http://elections.nytimes.com/2012/campaign-finance (last visited July 22, 2013) 24

Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 Election L.J. 125 (2010) 16

Ciara Torres-Spelliscy et al., Brennan Center for Justice, *Electoral Competition and Low Contribution Limits* (2009), *available at* http://www.brennancenter.org/sites/default/files/legacy/publications/Electoral.Competition.pdf 15, 16

Zogby International Poll, Apr. 12, 2001, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest01.out_2937&type=hitlist&num=2 (last visited July 22, 2013) 25

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Democratic Members of the United States House of Representatives, many of whom were actively involved in the passage of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 ("BCRA"). A complete list of the 85 Members of the House of Representatives participating as *amici* is provided in an appendix to this brief.

Amici are concerned about the continued vitality of BCRA's provision on aggregate campaign contributions and wish to preserve their ability to impose contribution limits to avoid both the actuality and appearance of corruption in politics. *Amici* bring to this Court the unique perspective of elected Members of Congress who are intimately familiar with the role that money plays in politics and who are deeply committed to maintaining public trust in the democratic process.

---

[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amici curiae submit this brief in support of Appellee urging affirmance of the District Court's decision upholding the constitutionality of the aggregate limit provision—Section 307(b)—of BCRA.

As the District Court found, the aggregate contribution limits at issue here are closely drawn to further the important interest in preventing corruption, which justifies the minimal, indirect First Amendment burden imposed on those who seek to contribute in excess of the contribution limits. Continued adherence to *Buckley v. Valeo,* 424 U.S. 1 (1976)—holding that contribution limits, including aggregate limits, receive intermediate scrutiny—is likewise justified by stare decisis as well as the deference to which Congress is entitled as a matter of relative expertise and democratic accountability.

Appellants urge this Court to disregard *Buckley*, which for nearly four decades has served as the core doctrinal framework for reviewing campaign finance laws. Congress and state legislatures have regulated against this backdrop for decades, and this Court itself has held that stare decisis necessitates adherence to the *Buckley* framework.

The longstanding deference afforded to Congress' decision to enact contribution limits is well founded. Elected Members of Congress, not unelected judges, possess expertise in the machinery of elections and the behavior of political actors. And it is elected Members of Congress, not unelected judges, who are best suited to determine the adequacy of contribution

limits to combat corruption of the democratic process.

Rather than reflecting an incumbent protection scheme, as some have claimed, these contribution limits reflect the American people's demands for more accountability from their leaders. This Court should honor this promise to *amici*'s constituents and reject Appellants' request to preclude the democratically elected branches from legislating to stem the corrosive influence of money on politics.

As this Court has continually recognized, contribution limits serve the important governmental interest of preventing real or apparent corruption. The corruption attacked by these limits includes not merely quid pro quo and outright bribery, but also extends to the undue influence exerted by large contributors. These threats of corruption, which were the impetus for campaign finance reform, remain very real today.

Aggregate limits in particular play a crucial role in preventing corruption or its appearance. First, aggregate limits buttress the base contribution limits, preventing circumvention of these primary limits. Second, aggregate limits are essential to preventing "dependence corruption," whereby government institutions become answerable to the narrow interests of a select group of elite contributors rather than responsive to the American public as a whole. Elimination of these limits would strip away a crucial limit on corruption, potentially unraveling the entire campaign finance regime.

ARGUMENT

I. As a Matter of Stare Decisis, Relative Expertise, and Democratic Accountability, This Court Should Continue Its Deference to the Elected Branches on Contribution Limits.

Appellants ask this Court to cast aside its longstanding doctrinal framework in favor of across-the-board strict scrutiny of campaign finance regulations. Precedent dictates, however, that contribution limits receive an intermediate level of scrutiny, affording Congress greater deference in enacting contribution limits than expenditure limits.

This deference properly allocates regulatory authority to Congress, the institution best equipped to police the corrupting effects of money in politics. Furthermore, Congress and state legislatures have legislated against the *Buckley* doctrinal backdrop for decades. Given that neither Appellants nor their *amici* present changed circumstances or new arguments that *Buckley* failed to consider, this Court should adhere to the settled rule that contribution limits—including aggregate limits—receive deferential review.

A. Under *Buckley*, Deferential Review Applies to Contribution Limits Generally.

"When contribution limits are challenged as too restrictive, [this Court] ha[s] extended a measure of deference to the judgment of the legislative body that enacted the law." *Davis v. FEC*, 554 U.S. 724, 737 (2008). This deferential standard of review originated in *Buckley*, which held that a contribution limit "entails only a marginal restriction upon the

contributor's ability to engage in free communication," in sharp contrast with the heavy burden on First Amendment rights imposed by an expenditure limit. 424 U.S. at 20-21.

Buckley required that contribution limits be "closely drawn" to further a "sufficiently important interest." *Id.* at 25. This standard is meaningfully different from the strict scrutiny applied to expenditure limits. For example, "the dollar amount [of a contribution limit] need not be 'fine tuned.'" *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 446 (2001) ("*Colorado II*") (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000)). When it comes to contribution limits, "*even significant interference* with associational rights is nevertheless valid if it satisfies the lesser demand of" intermediate scrutiny. *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (emphasis added) (internal quotation marks and citations omitted), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). Courts thus "respect Congress' decision to proceed in incremental steps," and "give deference to [the] congressional determination of the need for [a] prophylactic rule" when examining provisions intended to prevent circumvention of other lawful limits. *Id.* at 158, 171 (internal quotation marks and citations omitted).

For 37 years this Court has adhered to the *Buckley* contribution-expenditure dichotomy. In *Randall v. Sorrell*, the Court stated that stare decisis was "*especially* [applicable] where, as here, the [standard of review] has become settled through iteration and reiteration over a long period of time."

548 U.S. 230, 244 (2006) (emphasis added). In declining to overrule *Buckley*, the Court emphasized that "*Buckley* has promoted considerable reliance. Congress and state legislatures have used *Buckley* when drafting campaign finance laws. And, as we have said, this Court has followed *Buckley*, upholding and applying its reasoning in later cases. Overruling *Buckley* now would dramatically undermine this reliance on our settled precedent." *Id.*; *see also McConnell*, 540 U.S. at 137-38 ("[I]n its lengthy deliberations leading to the enactment of BCRA, Congress properly relied on the recognition of its authority contained in *Buckley* and its progeny. Considerations of stare decisis, buttressed by the respect that the Legislative and Judicial Branches owe to one another, provide additional powerful reasons for adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided.").

Nothing has changed to justify a departure from *Buckley*. Indeed, this Court has retained the *Buckley* framework over vigorous dissents raising the very same arguments that Appellants and their *amici* put forward now. *See, e.g.*, *McConnell*, 540 U.S. at 137 ("Our application of this less rigorous degree of scrutiny has given rise to significant criticism in the past from our dissenting colleagues. We have rejected such criticism in previous cases." (internal citations omitted)).

For example, Appellants' *amici* raise the argument that the asymmetry between unlimited, third-party expenditures and restricted contributions renders the *Buckley* framework unworkable to the

detriment of candidates and parties. *See, e.g.*, Br. for Wis. Inst. for Law and Liberty as *Amici Curiae* Supporting Appellants at 3-5. This Court, however, has repeatedly rejected the argument that the *Buckley* dichotomy marginalizes parties or candidates in a constitutionally significant manner. *See, e.g.*, *Colorado II*, 533 U.S. at 469-70 (Thomas, J., dissenting); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 415-18 (2000) (Thomas, J., dissenting).[2] Appellants and their *amici* also suggest that *Citizens United v. FEC*, 558 U.S. 310 (2010), called into question the continued vitality of the *Buckley* contribution-expenditure distinction. But the Court expressly declined to reach this question in *Citizens United*, and there is no reason to revisit it now. *See* 558 U.S. 310, 359 (2010) ("Citizens United . . . has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.").

This Court should thus adhere to stare decisis and refuse Appellants' invitation to jettison the *Buckley* standard of review for contribution limits. *Buckley* remains the paramount statement of First Amendment principles in the campaign finance realm, and for nearly four decades legislators have relied on this doctrinal backdrop. Appellants fail to

---

[2] Furthermore, should Congress determine that a problematic asymmetry exists, it remains free to increase statutory contribution limits to normalize the ratio between coordinated and uncoordinated funding. The Court need not constitutionalize a requirement that coordinated and uncoordinated spending be equalized, given the lesser First Amendment burden imposed by limits on the former.

raise any new developments that provide "the strong justification that would be necessary to warrant overruling so well established a precedent." *Randall*, 548 U.S. at 244. A departure from longstanding, settled law now would be difficult to explain, undermining the legitimacy of judicial review of campaign finance regulations and creating the perception that the Court is entering the "political thicket." *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

B. The Aggregate Contribution Limits at Issue Here are Plainly Constitutional Under *Buckley*'s Deferential Standard of Review.

Under the standard of review established in *Buckley* and continually reaffirmed by this Court, the aggregate contribution limits at issue here pose no constitutional problem. As established above, *Buckley* requires intermediate scrutiny when reviewing aggregate contribution limits. In considering the original $25,000 aggregate contribution limit, the *Buckley* Court applied only deferential intermediate scrutiny, rather than the strict scrutiny required for expenditure limits. *Buckley*, 424 U.S. at 38; *see also Davis*, 554 U.S. at 737 ("This Court has previously sustained the facial constitutionality of limits on discrete *and aggregate* individual contributions and on coordinated party expenditures." (emphasis added)). This conclusion squarely controls the instant case. Thus, despite Appellants' claims that heightened scrutiny applies, this Court has already refused to credit the argument that "aggregate limits impose greater speech burdens than base limits," Br. on the Merits

for Appellant Republican Nat'l Comm. at 12 ("RNC App. Br.").

Buckley expressly considered and rejected the claim that aggregate limits require heightened scrutiny, holding that "[t]he limited, additional restriction on associational freedom imposed by the overall ceiling . . . [is] constitutionally valid." 424 U.S. at 38. The Court found the theoretical differences between an aggregate and a base contribution limit unimportant to determining the appropriate level of First Amendment scrutiny, declaring the aggregate limit "no more than a corollary" of base limits. *Id.*[3]

Indeed, the aggregate contribution limits at issue function like a base contribution limit, not an expenditure limit. Like a base contribution limit, and in contrast to an expenditure limit, the aggregate limit merely places a ceiling on one's ability to fund the speech of another—so-called speech by proxy. The aggregate limit does not constrain one's "freedom to discuss candidates and issues" directly, *id.* at 21, and "[it] leave[s] the

---

[3] *Buckley* did not condition this application of intermediate scrutiny to aggregate limits on the existence of massive, glaring loopholes allowing circumvention of the base contribution limits—loopholes Appellants and their *amici* contend are no longer as gaping as in 1976. Tailoring questions speak to whether the regulation meets the relevant scrutiny standard; they do not define the level of scrutiny applied. Thus, even if Appellants and their *amici* are correct that some of these loopholes have closed, the *Buckley* holding that aggregate contribution limits receive deferential review continues to control the instant case.

contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.* at 22; *see* 2 U.S.C. § 431(8)(B) (excluding volunteer services and other means of association from "contribution" definition).

Buckley acknowledged that an aggregate limit "does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support," yet it held that an aggregate contribution limit is a "quite modest restraint upon protected political activity." 424 U.S. at 38. Thus, Appellants' argument that "while *base* limits restrict how *much* one may contribute to *particular* candidates, political parties, or PACs, *aggregate* limits restrict how *many* such entities one may support" has already been considered and rejected by this Court. RNC App. Br. at 9.

Nor do aggregate limits hinder the ability to campaign effectively. They merely "require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Buckley*, 424 U.S. at 21-22. Unlike an expenditure limit that prevents an individual from expressing his or her views, the aggregate limits simply require would-be

contributors to decide how to allot up to $123,200 in coordinated financial support.[4]

Furthermore, for the overwhelming majority of Americans, the First Amendment burden imposed by the aggregate ceilings is "merely theoretical," in contrast with the "direct and substantial" restraint imposed by expenditure limits. *Buckley*, 424 U.S. at 19. Only a miniscule number of contributors risk hitting the $123,200 aggregate ceiling on contributions. The median contribution for the top .01% of elite campaign contributors in 2012 was $26,584, *well below* either aggregate limit. *See* Lee Drutman, *The Political 1% of the 1% in 2012*, Sunlight Foundation Blog (June 24, 2013, 9:00 AM), http://sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct/.

"[D]istinctions in degree become significant only when they can be said to amount to differences in kind," and an aggregate limit creates only a "limited, additional restriction on associational freedom" beyond that imposed by base contribution limits. *Buckley*, 424 U.S. at 30, 38. Thus, the modest, marginal, and indirect First Amendment burden an aggregate limit could theoretically visit on a small number of would-be contributors is immaterial to the

---

[4] During the 2013-2014 election cycle, one may contribute up to $123,200 if one maxes out under both the candidate committee contribution cap of $48,600 and the $74,600 cap on contributions to other committees. The $117,000 total cap used by the District Court reflects the 2011-2012 limits. The aggregate contribution limits are indexed to inflation. *See* 11 C.F.R. § 110.5.

level of scrutiny applied. This Court should accordingly continue applying intermediate scrutiny to aggregate contribution limits and should uphold the limits at issue here.

C. As a Matter of Relative Expertise and Democratic Accountability, the Judiciary Should Defer to the Elected Branches' Determination that Contribution Limits are Needed.

This Court should defer to Congress' considered, bipartisan determination that contribution limits reduce corruption because Congress has more experience with campaign finance issues and better tools for predicting the effects of regulation. Empirical evidence demonstrates that contribution limits are actually antithetical to incumbent protection, leaving the judiciary no cause for suspicion of such enactments. Furthermore, this Court should leave room for "play in the joints" so that *amici*—the people's democratically elected representatives—may respond to future developments in campaign tactics and the persistent ingenuity of those seeking to evade contribution limits. Harold Leventhal, *Courts and Political Thickets*, 77 Colum. L. Rev. 345, 348-49 (1977) (quoting J. Holmes).

This Court has repeatedly recognized Congress' expertise in the area of campaign finance regulation. *McConnell* explained that "[t]he less rigorous standard of review we have applied to contribution limits (*Buckley*'s 'closely drawn' scrutiny) shows proper deference to Congress' ability to weigh

competing constitutional interests in an area in which it enjoys particular expertise." 540 U.S. at 137. *McConnell* further acknowledged that "Members of Congress have vastly superior knowledge" regarding "the function played by national committees and the interactions between committees and officeholders." *Id.* at 158.

Predicting the precise ramifications of any campaign finance regulation is challenging. Nevertheless, the democratically elected branches remain relatively better equipped than members of the federal judiciary—the vast majority of whom have never campaigned for office—to make judgments about the deleterious effects of money in politics and the mechanisms needed to effectively combat corruption. Such regulation requires making difficult predictions about whether a given practice will lead to corruption, the probability of detecting corruption, the capacity to exploit loopholes, and the degree to which corruption will warp democratic decision-making. Given judges' relative inexperience with campaigns, the judiciary "must accord substantial deference to the predictive judgments of Congress." *McConnell*, 540 U.S. at 165 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)).

Furthermore, unlike judges who must proceed case by case, Members of Congress are not so constrained and thus have the time and resources to make difficult decisions about the appropriate architecture of regulation. For example, in instituting the present system of regulation under BCRA, including the aggregate limits at issue here,

the Senate Committee on Governmental Affairs "issued a six-volume report summarizing the results of an extensive investigation into the campaign practices in the 1996 federal elections." *Id.* at 129. All told, "the legislative process took over six years of study and reflection by Congress." *McConnell v. FEC*, 251 F. Supp. 2d 176, 434 (D.D.C. 2003), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003) ("*McConnell D.D.C.*").

Similarly, in 1976, when Congress bolstered the campaign finance regime post-*Buckley*, including deciding to leave the original aggregate limits intact, four committees considered the regime, the full House and Senate spent a total of seven days debating the legislation, and the chambers considered 40 amendments. 32 Congressional Quarterly Almanac 459, 462-471 (1976). "This thoughtful and careful effort by [the] political branches, over such a lengthy course of time, deserves respect." *McConnell D.D.C.*, 251 F. Supp. 2d at 434.

Deference is particularly appropriate when it comes to fine details like the shoring up of base limits with aggregate limits. *Randall* explained that courts "cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments." 548 U.S. at 248; *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985) ("We are not quibbling over fine-tuning of prophylactic limitations, but are concerned

about wholesale restriction of clearly protected conduct.").

Contrary to the suggestions of Appellants and their *amici*, there is no cause to suspect Congress enacted contribution limits as part of a bipartisan incumbent protection scheme. In *Randall*, the Court found that heightened judicial scrutiny may be justified where contribution limits are so low that they may "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." 548 U.S. at 248-49. This would indeed be a powerful reason not to defer to the legislative branch regarding a contribution limit, but for the fact that the incumbent protection theory is demonstrably false.

The incumbent protection theory was, at best, disputed at the time of *Randall*. *See id.* at 287 (Souter, J., dissenting) ("The petitioners offered, and the plurality invokes, no evidence that the risk of a pro-incumbent advantage has been realized; in fact, the record evidence runs the other way, as the plurality concedes."). Subsequent empirical research demonstrates that the *Randall* Court's intuitions regarding the impact of contribution limits on electoral competition have not become reality.

A 2009 study by the nonpartisan Brennan Center for Justice examined elections in 42 states over a 10 year period, concluding that "the benefits of low contribution limits largely redound to challengers. . . . [T]he lower the contribution limit, the more competitive the election." Ciara Torres-

Spelliscy et al., Brennan Ctr. for Justice, *Electoral Competition and Low Contribution Limits* 2, 6 (2009), *available at* http://www.brennancenter.org/sites/default/files/legacy/publications/Electoral.Competition.pdf. The study found that contribution limits actually hurt incumbents, curbing the substantial fundraising advantage they enjoy over challengers.[5] *See id.* Lower contribution limits reduced the average margin of victory for incumbents, increased the likelihood of an incumbent having a viable challenger, and reduced the fundraising gap between challengers and incumbents. *See id.* at 7, 9. Thus, empirical research specifically designed to test the *Randall* Court's theory has disproven the incumbent protection hypothesis. *See also* Thomas Stratmann, *Do Low Contribution Limits Insulate Incumbents from Competition?*, 9 Election L.J. 125, 139 (2010) (finding that "having a [campaign contribution limit] increases competitiveness" and that "lower limits lead to tighter elections"); David M. Primo et al., *State Campaign Finance Reform, Competitiveness, and Party Advantage in Gubernatorial Elections, in The Marketplace of Democracy* 268, 277-78 (Michael P. McDonald & John Samples eds., 2006), *available at* http://www.campaignfreedom.org/doclib/20090916_Mily2004GovStateElecs.pdf ("[I]individual contribution limits have a large, statistically

---

[5] The incumbent protection theory was at least somewhat more plausible in the context of the Millionaire's Amendment invalidated in *Davis*. *See* 554 U.S. at 738. That case presented the unusual scenario in which a challenger may possess a fundraising advantage over an incumbent because the challenger is self-financed.

significant, and negative effect on the size of the winning vote margin, implying an increase in competitiveness.").

Appellants present no reason to think that an aggregate contribution limit poses a distinct entrenchment harm from that alleged—but disproven—in the broader contribution limit context. And "[a]bsent record evidence of invidious discrimination against challengers as a class, a court should generally be hesitant to invalidate legislation which on its face imposes evenhanded restrictions." *Buckley*, 424 U.S. at 31; *see also Shrink Mo.*, 528 U.S. at 395 (declining to second-guess validity of state interest where studies point in both directions).

A cynic might ask, "if contribution limits benefit challengers to the detriment of incumbents, why would a sitting Member of Congress vote to enact a contribution limit?" Although *amici* reject the premise that Members of Congress do not put the greater good first, a simple answer is apparent. Major scandals and the ensuing public outcry have served as the true impetus behind reforms—that is, the American people have been the driving force behind the regulation of money in politics. In the instant case, Congress enacted the original aggregate limits in response to the scandal surrounding Watergate, which was financed with secret funds from a few, massive contributors. *See* 120 Cong. Rec. 35,135-36 (1974) (statement of Rep. Frenzel) ("The $25,000 provision will be the death knell of the 'fat cat.' It will take not 1 year, but 160 years for the Stewart Motts and Clement Stones and other big

spenders to give $2 million to all Federal candidates, and 2,000 years to give $2 million to one candidate.").

That need for responsiveness continues today. Polling data illustrates that contribution limits reflect the demands of the American people for greater accountability from their elected officials, rather than a self-interested incumbent protection scheme. Support for contribution limits enjoys wide, bipartisan support among members of the public. A 2012 poll found that 62% of Republicans, 66% of Democrats, and 65% of Independents favored "limiting the amount of money individuals can contribute to political campaigns" over "allowing individuals to contribute as much money to political campaigns as they'd like." CBS News / New York Times Poll, Jan. 18, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12.out_11751&type=hitlist&num=0 (last visited July 22, 2013).[6]

---

[6] *See also* Democracy Corps Poll, Nov. 9, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12.out_1453&type=hitlist&num=0 (last visited July 22, 2013) (finding 67% of presidential election voters strongly agreed that "reasonable limits should be placed on campaign contributions and spending"); Associated Press Nat'l Constitution Poll, Sept. 17, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12. out_1447&type=hitlist&num=0 (last visited July 22, 2013) (finding 67% of respondents believed there should "be limits on the amount of money individuals can contribute to campaigns for President, Senate, and U.S. House"); Rasmussen Reports Poll, July 10, 2009, *available* at Polling the Nations, http://poll.orspub.com/document.php?id=quest09.out_14739&type=hitlist&num=0 (last visited July 22, 2013) (finding 56% of

When a major scandal prompts Congress to enact reforms tying itself to the mast to respond to its constituents, the judiciary should respect its efforts, not remove its regulatory authority altogether. That is, "[t]o say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." *McConnell*, 540 U.S. at 223-24 (quoting *Burroughs v United States*, 290 U.S. 534, 545 (1934) (quotation marks omitted)).

Finally, given the difficulty of anticipating developments in campaign finance and circumvention techniques, this Court should be extremely reluctant to further constitutionalize campaign finance law, foreclosing regulation by the democratically elected branches. "In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Deference, on the other hand, "provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137.

Congress has regulated money in politics for over 100 years, and the interplay between the legislature and the courts has yielded a delicate balance

---

likely voters thought the government should "regulate how much money individuals can give to political campaigns").

between competing concerns about government intrusion on speech and the corrupting effect of money on politics. *See, e.g.*, *id.* at 115-22 (summarizing the history of campaign finance legislation and judicial review). Despite this longstanding tradition, Appellants ask this Court to cast aside firmly established precedent and effectively declare campaign finance regulation outside the province of the democratically elected branches. This Court should instead continue to follow the course it charted in 1976, deferring to Congress vis-à-vis contribution limits generally, and aggregate limits specifically.

II. Contribution Limits in General, and Aggregate Contribution Limits in Particular, Remain Critical to Fighting the Actuality or Appearance of Corruption.

In addition to affirming the level of scrutiny applicable to contribution limits, this Court has consistently declared that contribution limits serve the important governmental interest of reducing the actuality or appearance of corruption. Preventing corruption and its appearance is critical to maintaining voters' faith in those who govern. Such "faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *Shrink Mo.*, 528 U.S. at 390.

Several of *amici*'s former colleagues have documented exactly the types of activities that arouse suspicions of malfeasance and corruption. As former Representative Chris Shays frankly admitted,

national parties raise soft-money by "promising donors access to elected officials." *McConnell D.D.C.*, 251 F. Supp. 2d at 471. Likewise, former Senator Simpson stated that it was "not unusual for large contributors to seek legislative favors in exchange for their contributions." *Id. at* 482. Former Senator Brock even remarked that "[large donors] for their part, feel they have a 'call' on these officials." *Id.* at 490; *see also* Br. of Solicitor General at 8-9 (canvassing testimony by senators that large contributions purchased influence). These former elected officials have thus confirmed that the threat of corruption is quite real for elected officials, as *amici* themselves can attest.

Aggregate contribution limits play a crucial role in preventing the actuality or appearance of corruption by ensuring individual contributors do not: (1) circumvent base contribution limits, or (2) contribute money with such breadth that it corrupts the institution as a whole. Yet despite these important interests, and Congress' repeated inclusion of aggregate limits in a complex regulatory regime, Appellants ask this Court to strike down aggregate limits as unnecessary for fighting corruption. *See* McCutcheon Appellant Br. at 8 ("McCutcheon App. Br.") ("aggregate contribution limits are no longer needed"); RNC App. Br. at 19 n.12 ("the ceiling no longer served any permissible purpose"). Because of the essential role these limits play in the campaign finance statutory scheme, this Court should reject Appellants' invitation and uphold the aggregate contribution limits.

A. Contribution Limits are Justified by the Interest in Preventing Both the Actuality and the Appearance of Corruption.

Since *Buckley*, this Court has upheld contribution limits as a closely drawn mechanism to "limit the actuality and appearance of corruption resulting from large individual financial contributions." 424 U.S. at 26; *see also, e.g.*, *McConnell*, 540 U.S. at 143; *Colorado II*, 533 U.S. at 456; *Shrink Mo.*, 538 U.S. at 390-91; *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 609 (1996) ("*Colorado I*"); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 195 (1981). Absent contribution limits, this Court has recognized, "the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. at 26-27. "Of almost equal concern" is "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse" in a world of unconstrained political contributions. *Id.* at 27. "Leave the perception of impropriety unanswered, and the cynical assumption that large contributors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works only if the people have faith in those who govern." *Shrink Mo.*, 528 U.S. at 390 (internal quotation marks omitted).

The potential corruption recognized by this Court is not limited to bribery or cash-for-vote schemes, but "extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *McConnell*, 540 U.S. at 143. While bribery and anti-earmarking laws deal with the more "clumsy attempts to pass contributions through to

candidates," Congress designed contribution limits to combat the subtle "undue influence" a single contributor could exert through excessive contributions. *Colorado II*, 533 U.S. at 441. Corruption has thus been "understood not only as quid pro quo agreements, but also undue influence on an officeholder's judgment, and the appearance of such influence." *Id.* at 440-41.

Contrary to Appellants' assertions, *Citizens United* did not limit the definition of corruption to quid pro quo arrangements. *Citizens United* addressed the distinct issue of independent expenditures, which, unlike contributions, "provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Buckley*, 424 U.S. at 47. The lack of "prearrangement and coordination of an expenditure . . . not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo." *Id.*; *see also Colorado II*, 533 U.S. at 440-41 ("limits on contributions are more clearly justified by a link to political corruption"); *Colorado I*, 518 U.S. at 615 (finding expenditure limits "less directly related to preventing corruption" than contribution limits).

Citizens United itself recognized a broader definition of corruption for contribution limits that includes guarding against undue influence. As this Court observed in *Citizens United*, although a quid pro quo might not be directly proved, "[t]he *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption." 558 U.S. at 357. *Citizens*

United thus reaffirmed the continued vitality of the interest in preventing the appearance of corruption with respect to contribution limits, even though it refused to credit that interest in the context of independent expenditures. *See id.* ("[*Buckley*] did not extend this rationale [of protecting "against the reality or appearance of corruption"] to independent expenditures, and the Court does not do so here."). This Court in *Citizens United* recognized that contribution limits serve a vital goal in limiting the well-founded fear of corruption and its appearance in the political process.

Indeed, the threat of actual and apparent corruption remains real today, with contribution limits standing as the crucial bulwark. In the current political environment, a small number of elite contributors remain willing to spend millions of dollars on campaigns. *See 2012 Top Overall Individual Contributors*, OpenSecrets.org, http://www.opensecrets.org/overview/topindivs_overall.php (last visited July 22, 2013) (showing 11 individuals giving over $5 million in the 2012 elections, including six giving over $13 million and one giving over $90 million). In the absence of contribution limits, a candidate raising $1 billion for a modern presidential campaign could receive roughly 10% of his or her total funds from one contributor and potentially 20% from the top 20 contributors. *See The 2012 Money Race: Compare the Candidates*, N.Y. Times, http://elections.nytimes.com/2012/campaign-finance (last visited July 22, 2013) (showing that 2012 presidential candidate campaigns raised around $1 billion). Such

influence would be even larger in Senate and House races, where a $10 million contribution would fund 17% and 60% of the most expensive races, respectively. *Spending in Key House and Senate Races*, Wash. Post, Nov. 8, 2012, *available at* http://www.washingtonpost.com/wp-srv/special/politics/key-race-spending/.

Even if one questions the actual influence exerted by such large contributors—a position that in *amici*'s view reveals a "myopia . . . [on] how the power of money actually works in the political structure," *Colorado II*, 533 U.S. at 450—the appearance of corruption caused by such large contributions is undeniable. Empirical polling data demonstrates that the American people undeniably view large contributions as engendering corruption. *See, e.g.*, Democracy Corps Poll, Nov. 9, 2012, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest12.out_1455&type=hitlist&num=6 (last visited July 22, 2013) (finding 64% of presidential election voters agreed with the statement that "big donors and secret money . . . control which candidates we hear about" and "undermine[ ] our democracy").[7] Thus, at the very least, the

---

[7] *See also* Rasmussen Reports Poll, July 10, 2009, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest09.out_14740&type=hitlist&num=1 (last visited July 22, 2013) (finding 88% of likely voters believed it likely that even "[i]f the government places limits on how much individuals can give to campaigns . . . special interest groups will still find ways to get money to politicians and influence their votes"); Zogby Int'l Poll, Apr. 12, 2001, *available at* Polling the Nations, http://poll.orspub.com/document.php?id=quest01.out_2937&type=hitlist&num=2 (last visited July 22, 2013) (finding 69% of

elimination of contribution limits would erode public trust to a "disastrous extent." *Buckley*, 424 U.S. at 27.

B. Aggregate Contribution Limits are a Necessary Part of the Closely Drawn System for Avoiding Corruption.

Aggregate limits play a critical role in fighting the actuality and appearance of corruption in the political process. In politics, "[m]oney, like water, will always find an outlet." *McConnell*, 540 U.S. at 224. This Court has long observed that contribution limits would be of little use fighting corruption without additional measures, such as aggregate limits, to ensure that base limits are not circumvented.

The Court upheld the $25,000 aggregate limit in *Buckley* not only because it was a "quite modest restraint upon protected political activity," but also because it "serve[d] to prevent evasion . . . by a person who might otherwise contribute massive amounts of money to a particular candidate." 424 U.S. at 38. With aggregate limits, Congress sought to solve the problem of an individual contributor using political parties and PACs as a mere transfer point for money going directly to a candidate. "[D]espite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law." *Colorado II*, 533 U.S. at 457. Indeed,

---

likely voters agreed with the position of Senator John McCain that "unlimited contributions . . . have a corrupting influence on our political system and should be banned").

"whether [parties] like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders." *Id.* at 452.

As this Court has cautioned, failure to recognize the possibility of circumvention reflects "a refusal to see how the power of money actually works in the political structure." *Id.* at 450. Nevertheless, Appellants and their *amici* contest the effectiveness of aggregate contribution limits in curbing such circumvention and preventing corruption.

First, they argue that laws permitting the transfer of money show Congress' lack of concern about the evasion of contribution limits. *See* RNC App. Br. at 20. Although political parties, PACs, and candidates can transfer money, 2 U.S.C. § 441a(a)(4-5), this does not indicate that Congress saw the transfer of an *unlimited amount* of money as unproblematic. Instead, the transfer and aggregate limit provisions work in tandem. Congress established an equilibrium between two competing concerns: giving political parties the flexibility to support the candidates of their choice, *cf. Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (noting that political parties have an interest in identifying and supporting candidates), while at the same time ensuring that transfers did not become a backdoor for excessive giving beyond the base limits. Aggregate limits in combination with unrestricted transfers provide the middle ground by preserving political parties' ability to support candidates while simultaneously protecting against abuses of contribution limits.

Second, Appellants argue that anti-earmarking provisions prevent concerns of undue influence, as candidates will not know the individual source of their contributions. Actual experience, however, recognized as part of the record in *McConnell*, shows that this formalism has not prevented circumvention. Testimony from contributors and elected officials revealed that incumbent senators "were very concerned about whether or not donors' checks were tallied to them." *McConnell D.D.C.*, 251 F. Supp. 2d at 477. Committees receiving donations "understood that [the money] had been raised by or for a particular federal candidate, and this affected how much the committee spent on behalf of that candidate." *Id.*

In assessing the ineffectiveness of anti-earmarking provisions standing alone, consider, for example, the 2012 Senate elections. The NRSC donated to 18 candidates and the DSCC donated to 15 candidates. *See Democratic Senatorial Campaign Cmte: Contributions to Candidates*, Open Secrets.org, http://www.opensecrets.org/parties/recipients.php?cycle=2012&cmte=DSCC (last visited July 22, 2013); *National Republican Senatorial Cmte: Contributions to Candidates*, Open Secrets.org, http://www.opensecrets.org/parties/recipients.php?cmte=NRSC&cycle=2012 (last visited July 22, 2013). Given the narrow universe of competitive races, a Senate candidate would certainly know who contributed money and for what purpose, regardless of whether the money was given to the candidate directly, a PAC, or a political party. Especially if contributors can give millions of dollars,

candidates will not be shocked that money from ostensibly disparate places actually has a single source.

Joint fundraising committees, which fall outside the earmarking ban, make this process even easier for large contributors. With joint fundraising committees, a contributor can walk into an event he or she knows is for a single candidate and write one check. *See* 11 C.F.R. § 102.17. Only afterwards do the political parties, PACs, and candidate divvy up the money. The post-hoc division of money neither makes the contributor think that he or she gave to separate organizations nor confuses the candidate as to which contributor gave the most collectively to his or her campaign or party. As this Court has recognized, "[t]o treat the earmarking provision as the outer limit of acceptable tailoring would disarm any serious efforts to limit the corrosive effects of . . . [the] understandings regarding what donors give what amounts to the party, which candidates are to receive what funds from the party, and what interests particular donors are seeking to promote." *Colorado II*, 533 U.S. at 462.

Finally, Appellants contend that aggregate limits are unnecessary because if the unrestrained contribution of money did take place, it would not be the massive influx feared. RNC App. Br. at 34; McCutcheon App. Br. at 41. They argue that the base contribution limits—$5,000 to a candidate's campaign committee, $32,400 per year to a national party, $10,000 a year to a state party, and $5,000 a year to an unlimited number of PACs—provide enough protection against corruption. RNC App. Br.

at 19; McCutcheon App. Br. at 8. The math tells a different story. As the lower court calculated, a single individual could contribute $3.5 million in one election cycle if only the base limits remained. *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 135 (D.D.C. 2012), *probable jurisdiction noted*, 133 S. Ct. 1241 (2013). This does not include additional giving to an unlimited number of PACs. *Id.* at 135 n.1.

Amici for Appellants also suggest that since $7 billion was raised in the 2012 election cycle, the potential millions contributed by a single individual would be an unnoticeable drop in the bucket. *See* Br. for Nat'l Republican Sen. Comm. & Nat'l Republican Cong. Comm. as *Amici Curiae* Supporting Appellants at 22 (noting how the NRSC's ability to transfer money is limited to approximately $1.5 million—only 0.02% of $7 billion). This contention by Appellants' *amici* defies common sense. According to this view, $100 million in contributions would not be a concern for corruption because it only amounts to 1.4% of the $7 billion total raised, much less $3.5 million at 0.05%. Millions of dollars funneled to a few candidates from a single contributor can and will have an undue influence amounting to corruption or the appearance of corruption.

Despite the claims of Appellants and their *amici*, aggregate limits play an integral role in the statutory scheme regulating campaign finance, providing a crucial backstop to the base contribution limits. A decision invalidating such limits would thus have substantial consequences, potentially undermining the efficacy of the entire regulatory regime governing money in politics.

C. Aggregate Limits Also Prevent Institutional Corruption.

Corruption is not limited to individual elected officeholders. In designing the 1974 aggregate limit, Congress also sought to protect against the danger of institutional corruption, where an individual contributor donates widely across candidates and parties. *See* 120 Cong. Rec. 35,135-36 (statement of Rep. Frenzel) (emphasizing that the aggregate limit prevented big contributors from donating significant amounts to *all* federal candidates). The risk is that the breadth of donations and subsequent influence across one or both political parties cross the line from access to creating the actuality or appearance of corruption.

Even assuming money is not transferred—and the anti-circumvention rationale does not apply—base limits standing alone would still allow one contributor to give large amounts to all facets of the campaign infrastructure, including candidate committees, national parties, state parties, and PACs. Scholar Lawrence Lessig warns that this circumstance can lead to "dependence corruption" in which Congress as an institution becomes increasingly obligated to the few contributors who give heavily to a wide swath of candidates rather than to the people themselves. Lawrence Lessig, *What an 'Originalist' Would Understand 'Corruption' to Mean*, Cal. L. Rev. (forthcoming 2013), *available at* http://ssrn.com/abstract=2257948 at 6, 27-28. Avoiding dependence corruption meets the

compelling interest of "protect[ing] the legitimate processes of the government." *Id.* at 17.[8]

As a concrete example, a contributor could give the maximum amount to one party's candidate in every competitive House and Senate race—around 81 in the House and 18 in the Senate in 2012—as well as the three national party organizations. *See House Race Ratings*, N.Y. Times, http://elections.nytimes.com/2012/ratings/house (last visited July 22, 2013) *and Senate Race Ratings*, N.Y. Times, http://elections.nytimes.com/2012/ratings/senate (last visited July 22, 2013). The total amount given would be $592,200, including $495,000 to the candidates and another $97,200 for the party organizations. A sophisticated contributor might also give to both political parties and to less competitive races where the incumbent sits on a committee regulating the contributor's interests. *See McConnell*, 540 U.S. at 148 (noting that more than half of the top 50 soft-money contributors gave to both parties). With this level of giving, a conservative estimate would be that the contributor has provided the maximum amount of money to around 100 Members of Congress.[9]

---

[8] Lessig also argues that the Founders viewed corruption as dependence corruption. *Id.* at 6-14.

[9] The 100 member estimate is based on two conservative assumptions: (i) 50% of the candidates the contributor backed in the 99 competitive elections win, equaling 50 current members; and (ii) the contributor will have given the maximum contribution to 50 other members of Congress, either because the contributor gave in past elections or because the members sit on committees with oversight over the contributor. The

The breadth of these contributions matters. The threat of corruption would not be ameliorated simply because the money was not funneled to one candidate. The party, its leaders, and a wide cross-section of Congress will all be indebted to a single contributor. *See McConnell D.D.C.*, 251 F. Supp. 2d at 489 (quoting a longtime lobbyist for the proposition that sophisticated political contributors are "not in the business of dispensing their money on purely ideological or charitable grounds"). Moreover, when 100 Members of Congress as well as national political organizations all receive the maximum donation from one contributor, the public will be—and should be—suspicious of corruption. As the public comes to see corruption penetrating the entire institution, the very "integrity of our system of representative democracy" will be at risk. *Buckley*, 424 U.S. at 26-27. *Amici* respectfully urge this Court to keep the integrity of the system intact.

---

estimate is conservative because it does not include contributors who give to both parties.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

July 25, 2013

Respectfully submitted,

PAUL M. SMITH
Counsel of Record
JESSICA RING AMUNSON
NEAL R. UBRIANI*
JENNER & BLOCK LLP
1099 New York Ave., N.W.
Washington, DC 20001
(202) 639-6000
psmith@jenner.com

**Admitted only in New York; supervised by principals of the Firm*

APPENDIX

LIST OF PARTICIPATING *AMICI*

The Members of the United States House of Representatives participating as *amici* are:

Karen Bass (CA-37)
Xavier Becerra (CA-34)
Earl Blumenauer (OR-3)
Robert A. Brady (PA-1)
Bruce Braley (IA-1)
Julia Brownley (CA-26)
Cheri Bustos (IL-17)
Lois Capps (CA-24)
Mike Capuano (MA-7)
Matt Cartwright (PA-17)
Judy Chu (CA-27)
David Cicilline (RI-1)
Steve Cohen (TN-9)
Gerald Connolly (VA-11)
John Conyers, Jr. (MI-13)
Joseph Crowley (NY-14)
Elijah Cummings (MD-7)
Susan Davis (CA-53)
Peter DeFazio (OR-4)
Rosa L. DeLauro (CT-3)
Ted Deutch (FL-21)
John Dingell (MI-12)
Lloyd Doggett (TX-35)
Donna Edwards (MD-4)
Keith Ellison (MN-5)
William Enyart (IL-12)
Anna Eshoo (CA-18)

Elizabeth Esty (CT-5)
Sam Farr (CA-20)
Alan Grayson (FL-9)
Raul Grijalva (AZ-3)
Alcee L. Hastings (FL-20)
Rush Holt (NJ-12)
Mike Honda (CA-17)
Jared Huffman (CA-2)
Sheila Jackson Lee (TX-18)
Hakeem Jeffries (NY-8)
Hank Johnson (GA-4)
Marcy Kaptur (OH-9)
William Keating (MA-9)
Daniel Kildee (MI-5)
Derek Kilmer (WA-6)
Ron Kind (WI-3)
Ann McLane Kuster (NH-2)
James Langevin (RI-2)
John Larson (CT-1)
Barbara Lee (CA-13)
John Lewis (GA-5)
David Loebsack (IA-2)
Zoe Lofgren (CA-19)
Alan Lowenthal (CA-47)
Michelle Lujan Grisham (NM-1)
Jim McDermott (WA-7)
Jim McGovern (MA-2)
George Miller (CA-11)
Gwen Moore (WI-4)
Jim Moran (VA-8)
Patrick Murphy (FL-18)
Eleanor Holmes Norton (DC)
Beto O'Rourke (TX-16)

Bill Pascrell (NJ-9)
Donald Payne Jr. (NJ-10)
Gary Peters (MI-14)
Chellie Pingree (ME-1)
Mark Pocan (WI-2)
Charles B. Rangel (NY-13)
C.A. Dutch Ruppersberger (MD-2)
Bobby Rush (IL-1)
Tim Ryan (OH-13)
Loretta Sanchez (CA-46)
John Sarbanes (MD-3)
Jan Schakowsky (IL-9)
Kurt Schrader (OR-15)
Bobby Scott (VA-3)
Jose Serrano (NY-15)
Brad Sherman (CA-30)
Louise Slaughter (NY-25)
Eric Swalwell (CA-15)
Mark Takano (CA-41)
Mike Thompson (CA-5)
Dina Titus (NV-1)
Paul Tonko (NY-20)
Niki Tsongas (MA-3)
Frederica Wilson (FL-24)
John Yarmuth (KY-3)

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
MAY 13 2013
OFFICE OF THE CLERK

No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON, *ET AL.*, *Appellants*,

v.

FEDERAL ELECTION COMMISSION, *Appellee*.

On Appeal from the United States District Court
for the District of Columbia

Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, Free Speech Coalition, Inc., Free Speech Defense and Education Fund, U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., English First, English First Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Institute on the Constitution, Western Center for Journalism, Policy Analysis Center, Conservative Legal Defense and Education Fund, Libertarian National Committee, Inc. and Constitution Party National Committee in Support of Appellants

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street
Suite 2
Ramona, CA 92065
Attorney for U.S. Justice Foundation

WILLIAM J. OLSON*
HERBERT W. TITUS
JEREMIAH L. MORGAN
JOHN S. MILES
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*

May 13, 2013

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. THE AGGREGATE LIMITS ON INDIVIDUAL ELECTORAL CONTRIBUTIONS ARE BASED UPON THE UNCONSTITUTIONAL DISTINCTION BETWEEN CONTRIBUTIONS AND EXPENDITURES DRAWN IN BUCKLEY V. VALEO 4

A. Buckley Wrongly Distinguished Electoral Contributions from Electoral Expenditures, Granting Them Lesser Constitutional Protection 6

B. The Buckley Distinction Between Contributions and Expenditures Conflicts With Citizens United 9

C. The Aggregate Limit on Contributions to Political Campaigns and Parties Violates the Right of the People to Assemble and to Petition the Government for Redress of Grievances 13

II. THIS COURT SHOULD NOT DEFER TO INCUMBENT LAWMAKERS IN SETTING THE RULES GOVERNING THE FINANCING OF CAMPAIGNS WAGED TO UNSEAT THEM 18

A. The District Court Erroneously Accepted the Premise that the Congressional Purpose Stated in the Federal Election Campaign Act is Benign and Accurate ... 18

B. Courts Have An Obligation to Do More than Just Recognize the Risk of Campaign Finance Laws Being Written to Favor Incumbents 23

C. Rather than Defer to the Political Branches, the Federal Judiciary has a Duty to Protect the Prerogatives of The People to Remove Incumbent Office Holders 26

III. The Aggregate Contribution Limits Conflict with the Categorical Principle Applied in Citizens United 29

A. The Lower Court Erroneously Relied on Supreme Court Decisions Preceding Citizens United 29

B. Citizens United Embraced a Categorical Approach to First Amendment Rights for Different Speakers, Rejecting Judicial Interest Balancing 30

C. The Court Should Return to the Text of the First Amendment to Determine the Constitutionality of the Aggregate Contribution Limits 35

CONCLUSION 40

TABLE OF AUTHORITIES

Page

U.S. CONSTITUTION
Article III, Section 1 28
Article VI 33
Amendment I ..... 3, *passim*

STATUTES
2 U.S.C. § 437g(d) 14

CASES
American Tradition Partnership, Inc. v. Bullock, 567 U.S. ___, 132 S. Ct. 2490 (2012) 32, 33
Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) 35
Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 3, 11, 31, 32
Buckley v. Valeo, 424 U.S. 1 (1976) ..... 3, *passim*
Citizens United v. FEC, 558 U.S. 310, 130 S.Ct. 876 (2010) ..... 3, *passim*
CSC v. Letter Carriers, 413 U.S. 548 (1973) 15
DeJonge v. Oregon, 299 U.S. 353 (1937) . 13, 14, 16
Edwards v. South Carolina, 372 U.S. 229 (1963) 17
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 11
Heller v. District of Columbia, 554 U.S. 570 (2008) 38, 39
Korematsu v. United States, 323 U.S. 214 (1944) 38
McConnell v. FEC, 540 U.S. 93 (2003) 24, 31
McCulloch v. Maryland, 17 U.S. 316 (1819) 36
Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 24

Thomas v. Chicago Park District, 534 U.S. 316 (2002) 16
United States v. Cruikshank, 92 U.S. 542 (1875) 13
Western Tradition Partnership, Inc. v. Attorney General, 363 Mont. 220, 271 P.3d 1 (2011) ... 32

MISCELLANEOUS

R. Bauer, "Campaign Finance After McCain-Feingold," 153 U.PENN. L.R. 5 (2004) 25, 27
Campaign Finance Institute, Early Post-Election Look at Money in the House and Senate Elections of 2012 (Nov. 9, 2012) 21
J. Campbell & S. Jurek, The Decline of Competition and Change in Congressional Elections (2003) 21
Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases, Neal Katyal (Mar. 20, 2011) 38
A. Hamilton, Federalist No. 78 28
H. Linde, "Who Must Know What, When, and How: The Systemic Incoherence of 'Interest' Scrutiny," printed in Public Values in Constitutional Law (S. Gottlieb, ed.) (Univ. of Mich. Press 1993) 36, 37
"The Top 10 Things Every Voter Should Know About Money-in-Politics," Open Secrets.org .. 19
Thirty-Thousand.org, "Reelection Rates of Incumbents in the U.S. House, First through 108th Congress," 26, 27
St. George Tucker, Views of the Constitution of the United States (Liberty Fund: 1999) 17
G. Will, "The Poet Who Took on LBJ," Washington Post (Dec. 13, 2005) 22

G. Will, "Korematsu and the dangers of waiving constitutional rights," Washington Post (Apr. 24, 2013) 38

INTEREST OF THE *AMICI CURIAE*[1]

Amici Downsize DC Foundation, Free Speech Defense and Education Fund, U.S. Justice Foundation, Gun Owners Foundation, English First Foundation, The Lincoln Institute for Research and Education, Western Center for Journalism, Policy Analysis Center, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). *Amici* DownsizeDC.org, Free Speech Coalition, Inc., Gun Owners of America, Inc., English First, and Abraham Lincoln Foundation are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization. *Amici* Libertarian National Committee, Inc. and Constitution Party National Committee are national political parties.

Each of these *amici* have filed *amicus curiae* briefs in this and other courts, and each is interested in the proper interpretation of state and federal constitutions and statutes. Various of these *amici* have filed briefs in several prior campaign finance cases in this Court:

Jeremiah W. Nixon v. Shrink Missouri Government

---

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

PAC, 528 U.S. 377 (2000).[2]

FEC v. Christine Beaumont, et al., 539 U.S. 146 (2003).[3]

FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007).[4]

Citizens United v. FEC, 558 U.S. 310 (2009).[5]

Arizona Free Enterprise Club's Freedom Club PAC, *et al.* v. Ken Bennett, 2011 U.S. LEXIS 4992 (June 27, 2011).[6]

William P. Danielczyk, Jr., *et al.* v. United States (cert. denied), 2013 U.S. LEXIS 1810 (Feb. 25, 2013).[7]

SUMMARY OF ARGUMENT

The aggregate limits on individual electoral contributions under the Federal Elections Campaign Act, as amended, reflect the distinction drawn in

---

[2] http://lawandfreedom.com/site/election/shrinkpac.html.

[3] http://lawandfreedom.com/site/election/Beaumont.pdf.

[4] http://lawandfreedom.com/site/election/WRTL%20II%20amicus.pdf.

[5] http://lawandfreedom.com/site/election/CU_amicus.pdf.

[6] http://lawandfreedom.com/site/election/AFEC_Amicus.pdf.

[7] http://lawandfreedom.com/site/election/DanielczykvUS_Amicus.pdf.

Buckley v. Valeo between contributions and expenditures. Expenditures were said to be protected by the freedom of speech, thereby deserving greater First amendment protection than electoral contributions which were only protected by the freedom of association. That distinction was wrong then, and it is wrong now. As Chief Justice Warren Burger pointed out in dissent in Buckley, the freedoms of speech and association are "two sides of the First Amendment coin," enjoying equal constitutional protection. Twenty-four years later, the Chief Justice's view was vindicated in Citizens United v. FEC wherein this Court applied strict scrutiny to the FECA ban on corporate speech, not on the ground of free speech, but freedom of association. Thus, this Court overruled Austin v. Michigan Chamber of Commerce on the ground that Government may not ban "political speech simply because the speaker is in an association that has taken on the corporate form." This right of association is based on the right of the people to peaceably assemble, a right long protected from government discrimination. Limited to content- and speaker-neutral time, place, and manner regulations, the Government may take only actions aimed at protecting the physical peace. Thus, the ban on electoral contributions, like the ban on electoral expenditures, unconstitutionally elevates government officials above the people.

Instead of deferring to incumbent lawmakers who set the rules which govern the financing of federal election campaigns, this Court should not be taken in by Congress's claim that campaign finance regulations are designed to "promote fair practices in the conduct

of the election campaigns for federal office." To the contrary, this Court should be wary of the claims of incumbent officeholders whose self-interest is directly at stake when making the rules governing the financing of campaigns waged by challengers seeking to replace them. Even though this Court has, from Buckley to the present, recognized this conflict of interests, it has failed to exercise its judicial role to say what the law of the First Amendment is, as applied to electoral communications.

Instead, this Court has allowed exceptions to fixed speech, press, assembly and petition principles to be overridden by balancing tests, permitting violations of those principles if it is perceived that the Government has strong enough interests. Citizens United scuttled this balancing approach, imposing a categorical First Amendment rule against all bans on speech and association based upon the identity of the speaker or the content of the communication, regardless of any asserted overriding interest, compelling or otherwise.

ARGUMENT

I. THE AGGREGATE LIMITS ON INDIVIDUAL ELECTORAL CONTRIBUTIONS ARE BASED UPON THE UNCONSTITUTIONAL DISTINCTION BETWEEN CONTRIBUTIONS AND EXPENDITURES DRAWN IN BUCKLEY v. VALEO.

Appellants urged the three-judge court below to apply the same strict scrutiny used to review

regulation of electoral expenditures to the aggregate limits on contributions to political candidates and parties fixed by the Federal Election Campaign Act, as amended, "because laws burdening political speech are subject to [such] scrutiny and the aggregate limits "'similarly burden" *First Amendment* rights.'" *See* McCutcheon v. FEC, 2012 U.S. Dist. LEXIS 139651 *1, *9 (D.D.C. 2012). The court below refused, accepting the distinction adopted in this Court's decision in Buckley v. Valeo, 424 U.S. 1 (1976):

> The difference between contributions and expenditures is the difference between giving money to an entity and spending the money directly on advocacy. Contribution limits are subject to lower scrutiny because they primarily implicate First Amendment rights of association, not expression, and contributors remain able to vindicate their associational interests in other ways. [McCutcheon, 2012 U.S. Dist. LEXIS 139651 at *12].

According to Buckley, since limits on the contributions of money "primarily implicate associational rights rather than rights of expression," they "impose only a 'marginal' restriction on a contributor's 'ability to engage in free communication.'" *See* McCutcheon at *12. In contrast, again according to Buckley, independent expenditures are "money injected directly into the nation's political discourse" whereas contributions are "money [that] goes into a pool from which another entity draws to fund its advocacy." *Id.*

By these distinctions, the Buckley Court

diminished the right of the people to associate together to engage in political speech, as if it were less worthy of First Amendment protection than the right of an individual, acting alone, to engage in speech. The Court thereby relegated associational speech to a second-class status. The distinction is not supported by the First Amendment text which, on its face, applies equally to laws that abridge the freedoms of the press and speech, and the rights of assembly and petition. In disregard of the plain text, Buckley established an artificial hierarchy of First Amendment rights. It was wrong for this Court to have done so then, and it is wrong now. Thankfully, this Court has laid the foundation to correct Buckley's error in Citizens United v. FEC, 558 U.S. 310 (2010). This case provides this Court with the opportunity to reverse that wrong and restore the right of the people peaceably to assemble — the source of the people's right of association — to the equal station to which that right is entitled according to the original First Amendment text.

A. Buckley Wrongly Distinguished Electoral Contributions from Electoral Expenditures, Granting Them Lesser Constitutional Protection.

In his prescient dissent in Buckley, Chief Justice Warren Burger rejected the Buckley majority's distinction between contributions and expenditures, charging his colleagues with having ignored "the reasons it finds so persuasive" to strike down limits on expenditures, "when it approves similarly stringent limitations on contributions." Buckley, 424 U.S. at

241. Finding that "contributions and expenditures are two sides of the same First Amendment coin," the Chief Justice noted that "limiting campaign contributions ... restricts the amount of money that will be spent on political activity – and it does so directly," as even the government argued, when it contended that contribution "limits will 'act as a brake on the skyrocketing cost of political campaigns.'" *Id.* at 242.

To further illustrate this point, Chief Justice Burger chided his colleagues for assuming that the contribution limit was so low that it would have only a marginal effect on the "amount of political activity and debate that the Government will permit to take place." *Id.* In response, the Chief Justice asserted that the majority's "logic ignores the disproportionate influence large contributions may have when they are made early in a campaign; 'seed money' can be essential, and the inability to obtain it may effectively end some candidacies before they begin." *Id.* at 242 n.5. In a further critique of the majority's facile assumption that the contribution limit will fall equally on all political discourse throughout the United States, the Chief Justice noted that a single limit on contributions in all federal campaigns is "clearly arbitrary – Congress [having] imposed the same ceiling on contributions to a New York or California senatorial campaign that it has put on House races in Alaska or Wyoming." *Id.* at 242 n.6.

The Chief Justice also debunked the majority's assumption that, unlike limits on independent expenditures, limits on contributions "'involve[] speech

by someone other than the contributor.'" *Id.* at 243. "The premise," the Chief Justice declared, "is demonstrably flawed." *Id.* Dismissing the majority's distinction as a mere "word game," he observed that "candidates and contributors spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words." *Id.* at 244.

Next, the Chief Justice faulted the majority for denigrating "freedom of association" in comparison with "freedom of speech," contending that he had "long thought [the two freedoms] were two peas from the same pod." *Id.* By lowering the constitutional bar, to limit contributions as merely an exercise of the lesser "freedom of association," the Chief Justice charged the Buckley majority with affording less protection of political speech than of obscenity and pornography which enjoy the greater protection of "freedom of speech." *Id.* at 245.

Finally, the Chief Justice questioned whether the limit on contributions, with all its exceptions, would serve its purported goal of preventing corruption or the appearance of corruption:

> [T]he Act's distinction between contributions in money and contributions in services remains, with only the former being subject to any limits[:] "The classification created only regulates certain types of disproportional influences[,] services are excluded from contributions. This allows the housewife to

> volunteer time that might cost well over $1,000 to hire on the open market, while limiting her neighbor who works full-time to a regulated contribution. It enhances the disproportional influence of groups who command large quantities of these volunteer services and will continue to magnify this inequity by not allowing for an inflation adjustment to the contribution limit. [*Id.* at 253-54.]

Notwithstanding the Chief Justice's critique, the Buckley distinction between contributions, as an associational right, and expenditures, as an individual speech right, stood for nearly 35 years, until Citizens United v. FEC.

B. The Buckley Distinction Between Contributions and Expenditures Conflicts With Citizens United.

Although the Citizens United Court rehearsed the Buckley Court's rule approving contribution limits, it refrained from reaffirming that rule. *See* Citizens United, 558 U.S. at 356-57. As the Court observed, "Citizens United has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny." *Id.* at 359. So the Court addressed only the question regarding the constitutionality of the absolute ban on corporations making independent expenditures in support of, or in opposition to, a person's candidacy for election to federal office. In conducting its review, the

Court did not hesitate to apply "strict scrutiny," and in the process of that review, to address the question before it not only as one implicating freedom of speech, but also the freedom of association.

Indeed, at the very outset of its discussion of the constitutionality of the corporate ban under the First Amendment, Citizens United forecast that the "ban on corporate speech" would not be salvaged by the argument that a "PAC created by a corporation can still speak." *Id.* at 337. Rather, the Court observed not only that the "PAC is a separate association from the corporation," but also that PACs were "burdensome alternatives ... expensive to administer and subject to extensive regulations." *Id.* And, the Court declared, "[g]iven the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign." *Id.* at 339. The Court found that this associational burden, in turn, "necessarily" burdens the quantity and quality of political speech because "'effective public communication requires the speaker to make use of the services of others.'" *Id.* Thus, the Court concluded that the ban on corporate speech was "'subject to strict scrutiny.'" *Id.* at 340.

The Court identified the threshold issue as whether First Amendment protected speech could be conditioned upon the identity of the speaker as a corporate body. *See id.* at 341-344. Citing a lengthy string of cases extending speech protection to corporations, the Court concluded that it consistently had "rejected the argument that political speech of

corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Id.* at 343. At stake, then, was whether the First Amendment protected the right of persons to associate in whatever lawful way the people in their sovereign judgment chose. *See id.* at 344. Relying heavily on First National Bank of Boston v. Bellotti,[8] decided two years after Buckley, the Court concluded "that the Government lacks the power to ban corporations from speaking." *Id.* at 347.

Only Austin v. Michigan Chamber of Commerce[9] stood in the way of this settled principle. But the Citizens United Court swept Austin away, not as a violation of the freedom of speech, but as a violation of the freedom of association:

> If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted ... it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. [*Id.* at 349.]

Enlisting even Buckley itself, Citizens United concluded that "the concept that government may

---

[8] 435 U.S. 765 (1978).

[9] 494 U.S. 652 (1990).

restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Id.* at 350. Thus, not surprisingly, Citizens United found in the media exemption a perfect illustration of "differential treatment [that] cannot be squared with the First Amendment," a discrimination that would:

> [A]llow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. [*Id.* at 352-53.]

In conclusion, Citizens United hearkened back to the founding era when the First Amendment principles mandated "no limits on the sources of speech and knowledge [—] '[a]ny number of people could join in such proliferating polemics, and rebuttals could come from all sides.'" *Id.* at 353. Thus, the First Amendment, as originally understood and written, secured not only the freedoms of press and speech, but also the rights of the people to assemble and to petition the government for redress of grievances" — **not** as weak-add-ons, but as equal partners in the First Amendment's protection of an open marketplace of ideas.

C. The Aggregate Limit on Contributions to Political Campaigns and Parties Violates the Right of the People to Assemble and to Petition the Government for Redress of Grievances.

Seventy-six years ago this Court affirmed that "[t]he right of peaceable assembly is a right **cognate** to those of free speech and free press and is **equally** fundamental." DeJonge v. Oregon, 299 U.S. 353, 364 (1937) (emphasis added). Quoting from United States v. Cruikshank[10] decided sixty-two years before, the DeJonge Court affirmed that "'[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances.'" *Id.* Indeed, this Court found that the best safeguard against "incitements to the overthrow of our institutions by force or violence" was to:

> [P]reserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that the government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government. [*Id.* at 365.]

Having acknowledged this foundation, the DeJonge

---

[10] 92 U.S. 542, 552 (1875).

Court held that "peaceable assembly for lawful discussion cannot be made a crime." *Id.* Further, the Court ruled that "[t]hose who **assist** in the conduct of such meetings cannot be branded as criminals on that score." *Id.* (emphasis added). Finally, the Court concluded that:

> The question, if the rights of free speech and peaceable assembly are to be preserved, is **not as to the auspices** under which the meeting is held **but as to its purpose**; **not** as to the **relations** of the speakers, **but whether their utterances transcend the bounds of freedom of speech** which the Constitution protects. [*Id.* (emphasis added).]

The aggregate limits imposed on contributions to political candidates and parties directly violate these principles. As the Buckley Court conceded, the original $25,000 aggregate ceiling "does impose an ultimate restriction upon the number of candidates and committees with which an individual may associate himself by means of financial support." Buckley, 424 U.S. at 38. Knowingly and willfully exceeding the aggregate amounts prescribed by statute was then, and still is, severely punished as a felony by fine and imprisonment. *See* 2 U.S.C. § 437g(d). In justification of this felony prohibition, the Buckley Court ruled that the contribution limits did not shut the door to other ways, for individuals to associate themselves in support of a campaign, including "independent political expression" and "volunteering their services." *Id.*, 424 U.S. at 28. Additionally, Buckley noted that individuals could contribute money

to PACs. *Id.* at 28 n.31.

By providing such alternative ways of associating in the overall political debate surrounding a federal election campaign, the Buckley Court assumed that the Government had afforded the people numerous meaningful avenues of participation. In support of this assumption, Buckley relied heavily on CSC v. Letter Carriers, 413 U.S. 548 (1973), which upheld a statute that limited the right of federal employees to associate in partisan political campaigns in order to better ensure "'fair and effective government.'" *See* Buckley, 424 U.S. at 27 and n.29. As then-Associate Justice William Rehnquist pointed out in his concurring and dissenting opinion in Buckley:

> The statute before us was enacted by Congress, not with the aim of managing the Government's property nor of regulating the conditions of Government employment, but rather with a view of regulation of the citizenry as a whole. [Buckley, 424 U.S. at 291 (Rehnquist, J., concurring and dissenting).]

Thus, as Citizens United has pointed out, Letter Carriers, and other similar precedents, "are inapposite ... stand[ing] only for the proposition that there are certain governmental functions that cannot operate without some restrictions on particular kinds of speech." Citizens United, 558 U.S. at 341. Decoupled from the voluntarily assumed duties of government employment, it is the sovereign right of the people to determine whether to associate, and with whom, so long as their association is peaceable and for a lawful

purpose. *See* DeJonge, 299 U.S. at 465-66. It is not for the Government to decide whether the limits that it has placed on certain associational rights in connection with federal elections may be constitutionally offset by other available associational opportunities to influence the outcome of a federal election. *See* Citizens United, 558 U.S. at 340-41, 344.

Nor is it within the powers of the Government to curtail citizen assemblies and associations because they allegedly "corrupt" the political process, much less create the "appearance" of such corruption. The constitutional right of the sovereign people to assemble is subject only to the condition that the assembly be "peaceabl[e]." Campaign finance reform laws are not subject-matter neutral "time, place and manner restriction[s] on speech," like the law upheld in Thomas v. Chicago Park District, 534 U.S. 316 (2002). Rather, campaign finance regulations singled out certain kinds of political speech — campaign or campaign-related — and, until Citizens United, required people who were associated with each other in a corporate entity to form a separate PAC in order to engage in certain electoral communications. Such an extra burden had, as its "purpose and effect[,] to silence entities whose voices the Government deem[ed] to be suspect." *Id.* at 340. Further, by providing exemptions, such as the one favoring media corporations, the Government impermissibly chose to enhance the electoral voices with which Congress wished to curry favor. *See id.* at 354-56.

Under the guise of a professed concern about corruption and the appearance of corruption of money

in politics, Congress seeks to preserve political peace, creating a system of campaign finance that strips the people of their sovereign power to associate voluntarily with one another in one of its "most pristine and classic form[s]."[11] Since the founding of the American constitutional republic, the people have had the right to join together in support of candidates for office without first having to register to obtain permission from the Government, and to report back. But, as the system of campaign finance regulation has been so chillingly and accurately described:

> Campaign finance regulations now impose "unique and complex rules" on "71 distinct entities." ... These entities are subject to separate rules for 33 different types of political speech. The FEC has adopted 568 pages of regulations, 1,278 pages of explanations and justifications for those regulations, and 1,771 advisory opinions since 1975. [Citizens United at 334.]

No longer a right of the people, running for political office in America is allowed by government "condescension." *See* St. George Tucker, Views of the Constitution of the United States, p. 238 (Liberty Fund: 1999). Such a system of electoral speech has no place in a republican form of government where the people are sovereign, and the government officials are their servants.

---

[11] The phrase is taken from Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

II. THIS COURT SHOULD NOT DEFER TO INCUMBENT LAWMAKERS IN SETTING THE RULES GOVERNING THE FINANCING OF CAMPAIGNS WAGED TO UNSEAT THEM.

A. The District Court Erroneously Accepted the Premise that the Congressional Purpose Stated in the Federal Election Campaign Act is Benign and Accurate.

The district court below based its opinion on the assumption that:

> Congress enacted the Federal Elections Campaign Act of 1971 (FECA) to "**promote fair practices** in the conduct of the election campaigns for Federal political offices," Pub. L. No. 92-225, preamble, 86 Stat. 3,3 (1972). [McCutcheon v. FEC, 2012 U.S. Dist. LEXIS 139651 (Sept. 28, 2012) (emphasis added).]

Throughout its opinion, the court deferred to the oft-repeated claim that campaign finance laws are designed to "prevent[] corruption or the appearance of corruption." *Id.* at 13. At no point did the district court ever examine Congress' motives, and the truthfulness of the Act's claimed purpose. When the plaintiffs argued that the current aggregate contribution limits were unconstitutionally low and overbroad, the Court simply deferred, stating "[i]t is not the judicial role to parse legislative judgment about what limits to impose" (*id.* at 19), citing Randall v. Sorrell, 548 U.S. 230, 248 (2006).

However, campaign finance laws are not like other laws. Campaign finance laws allow incumbents to write the rules by which they are challenged for re-election. Yet the court below acknowledged no judicial responsibility to scrutinize the effect of campaign finance legislation, its only reference to how the law might affect differently the campaigns of incumbents and challengers being:

> The effect of the aggregate limits on a challenger's ability to wage an effective campaign is limited because the aggregate limits do not apply to nonindividuals.... [*Id.* at 22 (citations omitted).]

A corollary of this statement by the district court is that, while the challenged aggregate limits on individuals adversely affect challengers, such limits do not entirely preclude their ability to wage an effective campaign. As in pinball, the fact that the table could have been tilted even more aggressively is no justification for ignoring the tilt that has occurred. Moreover, in the 2010 Congressional elections, individuals (who are subject to the aggregate statutory limitations being challenged) still "account[ed] for about two-thirds of the money going to Senate candidates and about half the money going to House candidates."[12] A restriction on aggregate individual contributions, therefore, is no small matter. Under those limits, the most that one individual may give to

---

[12] "The Top 10 Things Every Voter Should Know About Money-in-Politics," Open Secrets.org, http://www.opensecrets.org/resources/dollarocracy/04.php

all House and Senate races in one election cycle is $46,200.[13] Based on a $2,600 per election contribution limit, this aggregate amount would be exhausted with maximum donations to fewer than 18 campaigns, precluding contributions to any others.

However, it is a political axiom that money is more important to challengers than it is to incumbents. Compared to challengers, incumbents have the advantage of established name identification, prior experience in running for Congress, experience in complying with intentionally complex and often vague federal campaign finance laws, government paid staff in Washington, D.C. and their district, newsletter funds, and accessibility to the media, to name just a few.[14] Although challengers rarely can raise as much money as incumbents, they do not need to raise more money than incumbents to win. Challengers only need to raise enough money to convince the press, their volunteers, and the public that they are running a campaign that could win. Incumbents seek to keep

---

[13] The Republican and Democratic Parties have been beneficiaries of the aggregate contribution limit, as federal law permits much more, $70,800, to be given to party committees than to candidate committees. Large contributions to other political parties (*e.g.*, Constitution Party, Libertarian Party, Green Party) are relatively rare.

[14] For a more complete list of incumbent advantages, *see* Amicus Brief of Gun Owners of America, Lincoln Institute for Research and Education, National Citizens Legal Network (Citizens United), U.S. Border Control, and Policy Analysis Center, pp. 17-21 (June 7, 1999) in Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000), http://www.lawandfreedom.com/site/election/shrinkpac.html.

challengers' fund raising below the level required to be considered credible. The Campaign Finance Institute reported that:

> winning challengers ($2.0 million) did not raise as much as the incumbents they defeated ($2.6 million). As has been true almost every election since disclosure, **challengers did not need to raise or spend as much as incumbents to win, as long as they had enough to be heard**. [Campaign Finance Institute, Early Post-Election Look at Money in the House and Senate Elections of 2012 (Nov. 9, 2012) (emphasis added).][15]

A hypothetical explains the significant effect of this incumbent tilt. Assume there were 70 House races which were seriously contested in a given election cycle.[16] Further assume just 200 persons believed the Congress was leading the country in the wrong direction and wanted to contribute the maximum amount of $2,600 to challengers in each of these races — a total of $182,000 per contributor — certainly not an extraordinary amount of money to

---

[15] http://www.cfinst.org/Press/PReleases/12-11-09/Early_Post-Election_Look_at_Money_in_the_House_and_Senate_Elections_of_2012.aspx.

[16] *See, e.g.*, J. Campbell & S. Jurek, The Decline of Competition and Change in Congressional Elections (2003). (Based on a study of House elections from 1920 to 2000, "fewer than one-fifth of House seats in a typical year could be characterized as marginal.") http://www.acsu.buffalo.edu/~jcampbel/documents/Congress02.pdf.

many. The contributions received by each campaign from just this group of donors would be $520,000 — about 25 percent of the average amount of money spent in a successful challenge to a House incumbent in 2012. For many of these races, an extra 25 percent infusion of funds could be the difference in the race, particularly since money means so much more to challengers than incumbents.[17] The change in the outcome of a half-dozen, dozen, or more races could have a dramatic affect on the direction of the country. But under current law, these donors are limited to making maximum contributions to fewer than a quarter of these genuinely contested races.[18]

---

[17] The constitutionality of the $2,600 cap on individual contributions has not been questioned in this case, but it is part of the multifaceted plan by incumbents to make it more difficult for challengers. In the context of Presidential politics, Eugene McCarthy became a lifelong critic of the Federal Election Campaign Act of 1971, explaining how its provisions criminalized the very fund raising which made possible his successful challenge to President Lyndon Johnson just three years before. *See generally* G. Will, "The Poet Who Took on LBJ," Washington Post (Dec. 13, 2005). ("McCarthy's audacious challenge to an incumbent president was utterly dependent on large early contributions from five rich liberals. Stewart Mott's $210,000 would be more than $1.2 million in today's dollars.")

[18] Another aspect of federal election law makes this scenario less likely: many donors fear the retribution that could come to them or their businesses through the compelled disclosure of their support for challengers. Of course, that is why incumbents, often with governmental power to reward or punish, deride anonymous speech, wanting disclosure of the names, addresses, and occupations of those who would have the temerity to support their challengers. *See generally*, Citizens United, 130 S. Ct. at 980-82 (Thomas, J., dissenting).

It is beyond question that aggregate individual contribution limits benefit incumbents over challengers. That is, after all, why incumbents enacted those limits.

B. Courts Have An Obligation to Do More than Just Recognize the Risk of Campaign Finance Laws Being Written to Favor Incumbents.

Even in Buckley v. Valeo, 424 U.S. 1 (1976), this Court demonstrated some sensitivity to the problems created by rules written by incumbents:

> Since an incumbent is subject to these limitations to the same degree as his opponent, the Act, on its face, appears to be evenhanded. The **appearance of fairness**, however, may not reflect **political reality**. Although some incumbents are defeated in every congressional election, it is axiomatic that an incumbent usually begins the race with significant advantages. In addition to the factors of voter recognition and the status accruing to holding federal office, the incumbent has access to substantial resources provided by the Government.... Where the incumbent has the support of major special-interest groups ... and is further supported by the media, **the overall effect of the ... limitations enacted by Congress could foreclose any fair opportunity for a successful challenge.** [*Id.* at 31 n.33 (emphasis added).]

The Buckley Court apparently believed it acceptable that "the limitations may have a significant effect on particular challengers or incumbents" because the record did not demonstrate that the constraints met the remarkably high and arbitrary threshold that they "will **invariably** and invidiously **benefit incumbents** as a class." *Id.* at 33 (emphasis added). Yet, because the Court struck certain of the FECA restrictions, it concluded that "we need not express any opinion with regard to the alleged invidious discrimination resulting from the full sweep of the legislation as enacted." *Id.*

Even in Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000), where this Court deliberately chose to defer to Congressional "expertise," it recognized that its deference was somewhat circumscribed:

> Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments — at least **where that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge**. [*Id.* at 402 (emphasis added).]

And even more recently, in McConnell v. FEC, 540 U.S. 93 (2003), at least three justices in dissent concluded that Title I of the Bipartisan Campaign Reform Act:

> begins to look very much like an **incumbency protection plan**. *See* J. Miller,[19] Monopoly Politics 84-101 (1999) (concluding that regulations limiting election fundraising and spending constrain challengers more than incumbents. [*Id.* at 306 (Kennedy, J., dissenting).]

The Kennedy dissent concluded that the "more lenient treatment accorded to incumbency-driven politicians than to party officials who represent broad national constituencies must render all the more suspect Congress' claim that the Act's sole purpose is to stop corruption." *Id.* at 307. There was good reason for members of this court to question the motives of Congress, as during debate on BCRA, "Senator Feingold advised his colleagues that they were required to **cite corruption, regardless of whether it existed**, to satisfy the demands of the *Buckley* Court." R. Bauer, "Campaign Finance After McCain-Feingold," 153 U.PENN. L.R. 5, 29 (2004) (emphasis added).

What the Buckley Court felt that it "need not" do in 1974 has not been done in any intervening case, and certainly was not done by the district court below.

---

[19] Former Federal Trade Commission Chairman James Miller had appeared as an expert witness in the McConnell case on behalf of the challenge to BCRA filed by Congressman Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.org (now DownsizeDC.org), Citizens United, Citizens United Political Victory Fund, Michael Cloud, and Carla Howell. http://www.lawandfreedom.com/site/election/Witness/Miller.pdf.

However, this case presents this Court with an opportunity to take action upon the problem it has recognized for nearly 40 years — the "political reality" of campaign finance laws — without deference to the self-interested incumbents who wrote those laws.

C. Rather than Defer to the Political Branches, the Federal Judiciary has a Duty to Protect the Prerogatives of The People to Remove Incumbent Office Holders.

In Buckley, the Court found "[t]here is no such evidence to support the claim that the contribution limitations in themselves discriminate against major party challengers to incumbents." Buckley, at 32. Much such evidence now exists. An economic analysis of the anti-competitive effect of federal campaign finance law was presented in the McConnell litigation through the testimony of Dr. James Miller. (*See* note 19, *supra*.) And, since then, more studies attest to the success of such laws achieving their intended purposes. For example, a detailed study of "Reelection Rates of Incumbents in the U.S. House, First through 108th Congress,"[20] was published in 2006. This study concluded that the trend in reelection rates from the 64th Congress (1915-1917) through the 108th Congress (2003-2005) "indicates a gradual increase in reelection rates ... consistent with the view that the inherent advantages held by incumbents seeking reelection (vis-a-vis any challengers) may have increased over time."

---

[20] http://www.thirty-thousand.org/documents/QHA-08.pdf.

Id. at § 2.4.1.

The desire of those in office to retain their position is not new. As Edmund Burke explained: "Those who have been once intoxicated with power, and have derived any kind of emolument from it, even though but for one year, never can willingly abandon it."[21] There is no reason to believe that much has changed with our modern Congress. In his law review article on judicial deference, subtitled "When 'the POLS make the calls,'" former White House Counsel for President Obama, Robert F. Bauer, explained that "expressions of incumbents' attention to their own welfare surfaced" on multiple occasions during the consideration of BCRA. He specifically cited the fact that "both the Democratic Leader and the ranking Democratic Member of the Rules Committee noted during floor debate that the plain effect of the [BCRA Millionaire's Amendment] was 'incumbent protection.'" R. Bauer, "Campaign Finance," pp. 27-28. It is with good reason that the Congress is called one of the "political" branches, and no reason to believe that incumbents would write such laws without regard to their political effect. There is no reason for the Court to trust a political branch not to be political.

The rationale for the judiciary to defer to the political branches is rooted in the fact the Congress and Presidency serve during terms of years, and, unlike the federal judiciary, can be voted out by the people. Yet any law which artificially enhances the

---

[21] http://quotes.dictionary.com/those_who_have_been_once_intoxicated_with_power

power of the incumbent political class diminishes a challenger's chance of success and thereby constitutes an encroachment on the sovereignty of the people to elect leaders of their own choosing.

The judiciary serves during periods of "good Behavior" (Art. III, Sec. 1) due to a constitutional provision which Alexander Hamilton described as an:

> excellent barrier to the encroachments and oppressions of the representative body.... [I]t is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws. [A. Hamilton, Federalist No. 78, G. Carey & J. McClellan, The Federalist, Kendall Hunt (1990) 401.]

It was to correct injustices such as incumbent protection laws that the "good Behavior" clause was written into the Constitution. First Amendment rights are not matters that were entrusted to judges to be compromised away through the use of artificial balancing tests which may give the appearance of constitutional analysis, but instead have served as legal cover for reaching the result judges prefer.

III. THE AGGREGATE CONTRIBUTION LIMITS CONFLICT WITH THE CATEGORICAL PRINCIPLE APPLIED IN CITIZENS UNITED.

A. The Lower Court Erroneously Relied on Supreme Court Decisions Preceding Citizens United.

The court below upheld the challenged electoral contribution limits based on this Court's decisions which preceded Citizens United v. FEC, 558 U.S. 310 (2010). *See* McCutcheon v. FEC, 2012 U.S. Dist. LEXIS 139651, *9-13 (D.D.C. 2012) (citing Buckley v. Valeo, 424 U.S. 1 (1976); Cal. Med. Ass'n v. FEC, 453 U.S. 182 (1981); and McConnell v. FEC, 540 U.S. 93 (2003)). Thus, it applied the lower level of scrutiny established in Buckley that "contribution limits will be valid as long as they satisfy 'the lesser demand of being closely drawn to match a sufficiently important interest.'" *Id.* at *9.

Although urged to apply strict scrutiny based on the proffered theory that Citizens United had erased the distinction between electoral expenditures and contributions, the court below demurred, refusing to require proof of a compelling state interest. While it "acknowledge[d] the constitutional line between political speech and political contributions grows increasingly difficult to discern," the district court "declined Plaintiffs' invitation to anticipate the Supreme Court's agenda." *Id.* at *10.

As demonstrated in Section I, *supra*, appellants

are correct that Citizens United has destroyed the constitutional dichotomy between electoral expenditures and contributions, undermining the basis for applying different levels of scrutiny. But Citizens United has done more than that. It has discarded interest-balancing tests altogether, substituting therefor fixed categorical principles derived from the original First Amendment text and history.

B. Citizens United Embraced a Categorical Approach to First Amendment Rights for Different Speakers, Rejecting Judicial Interest Balancing.

Prior to Citizens United, campaign finance regulation, including the Constitutional right of corporations to engage in political speech, was subject to balancing tests, whereby the Government was required to demonstrate a sufficiently strong interest to override a person's right to full participation in the free marketplace of ideas, as secured by the First Amendment. *See generally* Citizens United v. FEC, 558 U.S. 340-62 (2010). Even when applying the most stringent "strict scrutiny" test, requiring a "compelling state interest" which was "narrowly tailored" and using the "least restrictive means," this Court permitted governmental restrictions on political speech, notwithstanding the First Amendment's general categorical ban on discriminatory laws based on the identity of the speaker. *See id.*, 558 U.S. at 340-41.

In Citizens United, this Court took the initiative to revisit the exception for electoral communications to

the general rule, addressing the question of whether Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), should be overruled, because "Austin had held that political speech may be banned based on the speaker's corporate identity." *See* Citizens United, 558 U.S. at 319.[22] Austin relied on the "strict scrutiny" test and found that the State of Michigan had "a compelling governmental interest in preventing 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *See* Citizens United, 558 U.S. at 348.

Although the Citizens United Court stated that "[l]aws that political speech are 'subject to strict scrutiny...'" (*id.* at 340), it did not overrule Austin on the ground that it failed to apply correctly the strict scrutiny test. Rather, the Court abandoned the use of the "strict scrutiny" test, refusing to apply any balancing test, strict, exact, or otherwise. Instead, it stated: "The Government may commit a constitutional wrong when by law it identifies certain preferred speakers," and asserted that "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment." *Id.* 558 U.S. at 340, 354. In essence, the Citizens United Court reasoned that:

> [t]he First Amendment does not permit

---

[22] At the request of the Court in Citizens United, the issue of overruling Austin and portions of McConnell v. FEC, 540 U.S. 93 (2003), was set for reargument (174 L.Ed.2d 599 (2009)), and then reargued on September 9, 2009.

> Congress to make ... categorical distinctions based on the corporate identity of the speaker and the content of the political speech. [*Id.*, 558 U.S. at 364.]

By overruling Austin, the Court "return[ed] to the principle":

> that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations. [*Id.*]

Under Citizens United, no court can justify any law that discriminates on the basis of the speaker's identity, no matter how strong the government's countervailing interest.

This Court made this understanding of the Citizens United holding crystal clear in American Tradition Partnership, Inc. v. Bullock, 567 U.S. ___, 132 S. Ct. 2490 (2012). In that case, the Montana State Supreme Court had attempted to cabin Citizens United as a narrow factual ruling where Congress had failed to demonstrate a compelling interest to impose a nationwide ban on corporate electioneering communications with respect to federal election campaigns. The state court found that Montana's ban on corporate speech rested upon a very different factual base — Montana's special historic experience of corporate corruption of state elections of government officials. *See* Western Tradition Partnership, Inc. v. Attorney General, 363 Mont. 220, 271 P.3d 1, 11-48

(2011). The Montana court explained:

> *Citizens United* was decided under **its facts** or lack of facts.... Therefore, the **factual record** before a court is critical in determining the validity of a governmental provision **restricting speech**.... The Supreme Court held [in Citizens United] that laws that burden political speech are subject to **strict scrutiny**, which requires government to prove that the law furthers a compelling state interest and is narrowly tailored to that interest. The Court ... clearly endorsed an analysis of restrictions on speech, placing the burden upon the government to establish a compelling interest.... Here the government met that burden. [*Id.*, 271 P.3d at 15 (emphasis added).]

In its opinion announcing summary reversal, this Court relied first upon the Constitution's Article VI supremacy clause, thereby verifying that the Citizens United "holding" rested upon a fixed rule of law, not upon a flexible standard of review dependent upon variances of fact. *See* American Tradition, 132 S. Ct. 2490 at 2491. Second, the Court explained that "Montana's arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case." *Id.* In a last-ditch effort to preserve the power of the courts to balance government interests against First Amendment rights, Justice Breyer dissented, protesting that:

> this Court's legal conclusion [in Citizens United] should not bar the Montana Supreme Court's finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana. Given the history and political landscape in Montana, that court concluded that the State had a **compelling interest** in limiting independent expenditures by corporations. [*Id.* (emphasis added).]

By refusing even to entertain arguments based upon the Montana ruling, this Court sent an unequivocal message that Citizens United had not been decided on the ground that there was insufficient factual evidence of a compelling governmental interest. Rather, the Court ruled that, because corporate expenditures do not, per se, constitute "*quid pro quo* corruption," such speech could not be found to be outside the protection of the First Amendment. *See* Citizens United, 558 U.S. at 357-61. Indeed, this Court found that "[a]n outright ban on corporate political speech during the critical preelection period is not a permissible remedy," Congress having "created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption." *Id.* at 361.

To be sure, although Citizens United mentioned the distinction between expenditures and contributions, it did not directly decide (much less affirm) that distinction. Indeed, as this Court noted, "Citizens United ... has not suggested that the Court should reconsider whether contribution limits should

be subjected to rigorous First Amendment Scrutiny."[23] Citizens United, 558 U.S. at 359. Thus, this case presents this Court with the first opportunity to apply a categorical approach to contribution limits.

The Citizens United holding undermined Buckley's distinction between campaign contributions and expenditures. Not only is the distinction a form of speaker discrimination, it is also a form of content discrimination. Citizens United did not apply judicial balancing tests to these forms of discrimination, but rather struck them down categorically as a breach of the First Amendment guarantees. "The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech." Citizens United, 558 U.S. at 364.

C. The Court Should Return to the Text of the First Amendment to Determine the Constitutionality of the Aggregate Contribution Limits.

This Court should take the opportunity presented by this case to reconsider entirely its use of and reliance on interest balancing, and whether it is indeed a proper function of the judiciary. The balancing of interests is a determination of whether a particular governmental action (or inaction) is the most

---

[23] Although this Court mentioned the distinction in a post-Citizens United decision, Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011), that mention was merely *dicta*.

appropriate as among other potential courses of action. This type of determination is primarily a function of the legislature. "If a certain means to carry into effect any of the powers, expressly given by the constitution to the government of the Union, be an appropriate measure, not prohibited by the constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance." McCulloch v. Maryland, 17 U.S. 316 (1819).

Returning to a constitution's basic rule, former Oregon Supreme Court Justice Hans Linde explained (prior to Citizens United):

> The Constitution directs governments how to act and how not to act. The Constitution does not say that a government may act contrary to those directives if judges believe that the government has good enough reasons to do so. Yet that is the current doctrine in the United States Supreme Court. What is good enough reason has become the subject of an elaborate structure of formulas. [H. Linde, "Who Must Know What, When, and How: The Systemic Incoherence of 'Interest' Scrutiny," printed in Public Values in Constitutional Law, p. 219 (S. Gottlieb, ed.) (Univ. of Mich. Press 1993).]

Justice Linde explained how judicial "formulas" work in the context of campaign finance regulation:

> A 1990 decision, *Austin v. Michigan Chamber of Commerce*, serves as one of many examples

> of the current formula. The chamber challenged a Michigan law against using corporate funds in political campaigns under the First Amendment and under the equal protection clause. The Court stated the First Amendment question to be whether the restrictions "burden the exercise of political speech and, if they do, whether they are narrowly tailored to serve a compelling state interest." Coming to the chamber's claim of unequal treatment, the Court recited in identical terms that, for fundamental rights like political speech, statutory classifications "must be narrowly tailored to serve a compelling state interest." [*Id.*, p. 220.]

However, the balancing tests, or judicial "formulas," are useful for just one thing — masking the agenda of an activist court to inject its own policy preferences into what should be a categorical constitutional issue:

> Any formula that scrutinizes laws as a means toward ends presupposes an instrumentalist or utilitarian test for valid laws.... Many of [the Court's] decisions do not turn on calculations of social utility.... They turn instead on undisguised value judgments between a constitutional claim and an opposing governmental policy. [*Id.*, p. 232.[24]]

---

[24] Justice Linde's statement is supported by the outcome in the case that marked the beginning of judicial interest balancing. In the ignominious Korematsu decision, this Court held that an order

Instead of repeating errors of the past, this Court should eschew interest balancing as it did in Heller to determine that the gun control laws in the District of Columbia violated the Second Amendment guarantee. *See* Heller v. District of Columbia, 554 U.S. 570 (2008). During oral argument, Chief Justice Roberts led the way with the observation:

> [T]hese various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution.... Isn't it enough to determine the scope of the existing right that the amendment refers to ... and determine ... how this restriction and the scope of this right looks in relation to [it].... I'm not sure why we have to articulate some very intricate standard. I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First

---

excluding over 100,000 Japanese-Americans from certain areas of the country was constitutional, passing "the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214 (1944). This decision is now considered a blemish on the American legal system, frequently listed with such decisions as Dred Scott and Plessy v. Ferguson. *See, e.g.*, G. Will, "Korematsu and the dangers of waiving constitutional rights," Washington Post (Apr. 24, 2013). Even the U.S. Department of Justice has now confessed error with respect to the facts that were presented by it to this Court for "balancing." *See* Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases, Neal Katyal (Mar. 20, 2011), http://blogs.justice.gov/main/archives/1346.

> Amendment picked up. [Transcript of Oral Argument, p. 44, Dist. of Columbia v. Heller, 554 U.S. 570 (2008).]

Justice Breyer's dissent insisted on a "judge-empowering 'interest-balancing inquiry'" for future Second Amendment cases, but the Court rejected it:

> The very enumeration of the right takes out of the hands of the government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the **people** adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. [Heller, 554 U.S. at 634-35 (bold added).]

As explained herein, the Court should re-analyze the contribution limits based on the text of the First Amendment, without reference to judicially created interest-balancing tests. Instead of engaging in interest balancing, this Court should cast off the "baggage" that has collected around the First Amendment. If it does that, it can reach no conclusion other than that the federal election contribution limits at issue herein are unconstitutional, as demonstrated in section I.C., *supra*.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
(760) 788-6624
Attorney for U.S. Justice Foundation

WILLIAM J. OLSON*
HERBERT W. TITUS
JEREMIAH L. MORGAN
JOHN S. MILES
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue West
Suite 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

**Counsel of Record*
May 13, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-536

MAY 13 2013
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SHAUN MCCUTCHEON, ET AL.,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
PAUL M. SHERMAN*
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
psherman@ij.org

INSTITUTE FOR JUSTICE
FLORIDA CHAPTER
CLAUDIA MURRAY
999 Brickell Avenue
Suite 720
Miami, FL 33131
(305) 721-1600

**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Appearance-of-Corruption Standard Is Inconsistent with Representative Government 6

A. The modern appearance-of-corruption standard is an unwarranted expansion of conflict-of-interest rules for judges and federal employees that have no proper application to elected representatives 7

B. When applied to elected representatives, the appearance-of-corruption standard deprives the public of important information about the state of the government 12

II. The Appearance-of-Corruption Standard Conflicts with Basic First Amendment Principles 19

A. The appearance-of-corruption standard permits the prohibition of modes of speech and association merely because the public does not like them 20

B. The appearance-of-corruption standard lacks objectivity and has created confusion in lower courts 23

TABLE OF CONTENTS – Continued

Page

C. The appearance-of-corruption standard invites reliance on unreliable evidence, or on no evidence at all..... 27

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

CASES

Ariz. Free Enter. Club's Freedom PAC v. Bennett, 131 S. Ct. 2806 (2011) 1, 20, 26

Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) 21

Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) 24

Boos v. Barry, 485 U.S. 312 (1988) 24

Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) 20

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Caperton v. A. T. Massey Coal Co., 556 U.S. 868 (2009) 9, 10, 11

Citizens United v. FEC, 130 S. Ct. 876 (2010) 1, 10, 11, 24

Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000) 28

Davenport v. Wash. Educ. Ass'n, 551 U.S. 177 (2007) 1

Edenfield v. Fane, 507 U.S. 761 (1993) 27

FEC v. Wisc. Right to Life, Inc., 551 U.S. 449 (2006) 25

Green Party of Connecticut v. Garfield, 616 F.3d 189 (2d Cir. 2010) 25

TABLE OF AUTHORITIES – Continued

Page

Ill. Liberty PAC v. Madigan, No. 12 C 5811, 2012 U.S. Dist. LEXIS 144259 (N.D. Ill. Oct. 5, 2012) 29, 30

Landell v. Sorrell, 382 F.3d 91 (2d Cir. 2002) 26

McComish v. Bennett, 611 F.3d 510 (9th Cir. 2010) 26

McConnell v. FEC, 540 U.S. 93 (2003) 1, 5

Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343 (2011) 11

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) 22, 28, 29

Payne v. Tennessee, 501 U.S. 808 (1991) 30

Preston v. Leake, 660 F.3d 726 (4th Cir. 2011) 25, 26

Randall v. Sorrell, 548 U.S. 230 (2006) 1, 26

Scott v. Roberts, 612 F.3d 1279 (11th Cir. 2010) 26

Snyder v. Phelps, 131 S. Ct. 1207 (2011) 20, 24

Texas v. Johnson, 491 U.S. 397 (1989) 21, 22

United States v. Eichman, 496 U.S. 310 (1990) 21, 22

United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961) 7, 8

U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973) 8, 9

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 24

TABLE OF AUTHORITIES – Continued

Page

Wisc. Right to Life Inc. v. FEC, 546 U.S. 410 (2006) 1

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I ..... *passim*

REGULATIONS

Exec. Order No. 11,222, 3 C.F.R. 306 (1964-1965), *revoked* Exec. Order No. 12,674 7

3 C.F.R. 215 (1990) 7

OTHER PUBLICATIONS

120 Cong. Rec. S4553 (daily ed. Mar. 27, 1974) 16

Aesop, *The Wolf in Sheep's Clothing* (circa 550 B.C.) 4

Bradley A. Smith, *Faculty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049 (1996) 13

Cato, *Letter VII* (1787), *reprinted in The Anti-Federalist Papers* 321 (Ralph Ketcham ed., Signet Classics 2003) 4

David M. Primo, *Campaign Contributions, and Appearances of Corruption, and Trust in Government, in Inside the Campaign Battle: Court Testimony on the New Reforms* (A. Corrado *et al.* eds., 2003) 23

TABLE OF AUTHORITIES – Continued

Page

David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence From the States*, 5 Election L.J. 23 (2006) 22

Federal Election Campaign Act of 1973: Hearings on S. 372 Before the Subcomm. on Commc'ns of the S. Comm. on Commerce, 93d Cong. 78 (1973) (statement of Sen. Hart) 17

Fred Wertheimer, *Supreme Court Could Create System of Legalized Bribery in Washington Depending on Its Decision in McCutcheon Case,* The Huffington Post (Feb. 21, 2013 5:02 p.m.), http://www.huffingtonpost.com/fred-wertheimer/campaign-finance-supreme-court_b_2734007.html 23

Hearings on S. 372 Before the Subcomm. on Privileges & Elections of the S. Comm. on Rules & Admin., 93d Cong. 207 (1973) 17

Hearings on S. 1103, S. 1954, S. 2417, & S.3 Before the Subcomm. on Privileges & Elections of the S. Comm. on Rules & Admin., 93d Cong. 33 (1973) 16

James Madison, *James Madison's Notes of the Constitutional Convention* (July 11, 1787), *available at* http://www.consource.org/document/james-madisons-notes-of-the-constitutional-convention-1787-7-11 5

John 7:24 (King James).....4

TABLE OF AUTHORITIES – Continued

Page

John R. Lott, Jr., *A Simple Explanation for Why Campaign Expenditures Are Increasing: The Government Is Getting Bigger*, 43 J.L. & Econ. 359 (2000) 15

John Samples, *The Fallacy of Campaign Finance Reform* (2006) 18

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) *in James Madison: Writings* (Jack N. Rakove ed., 1999) 14

Letter from John Emerich Edward Dalberg, Lord Acton, to Bishop Mandell Creighton (Apr. 5, 1887), *available at* http://oll.libertyfund.org/title/2201/203934 14

Nathaniel Persily and Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Constitutes Constitutional Law*, 153 U. Pa. L. Rev. 119 (2004) 2, 23, 28

Peter W. Morgan, *The Appearance of Impropriety: Ethics Reform and the Blifil Paradoxes*, 44 Stan. L. Rev. 593 (1992) 7

Peter W. Morgan & Glenn H. Reynolds, *The Appearance of Impropriety: How the Ethic Wars Have Undermined American Government, Business, and Society* (1997) 14

TABLE OF AUTHORITIES – Continued

Page

Pew Research Ctr. For People & the Press, *Majority Says the Federal Government Threatens Their Personal Rights* (Jan. 31, 2013), http://www.people-press.org/2013/01/31/majority-says-the-federal-government-threatens-their-personal-rights/ 31

Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171 (2001) 28, 29

Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989) 5

Stephen Ansolabehere & James M. Snyder, Jr., *Money and Institutional Power*, 77 Tex. L. Rev. 1673 (1999) 14

Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173 (2003) 12

The Federalist No. 10 (James Madison) (Clinton Rossiter ed., 1961) 18

William Manchester, *The Last Lion: Winston Spencer Churchill, Visions of Glory 1874-1932*, 348 (1983) 18

INTEREST OF THE *AMICUS*

The Institute is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. As part of that mission, the Institute has litigated cases across the country challenging laws that restrict the ability of Americans to finance political speech, including representing petitioners in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011). The Institute has also filed *amicus curiae* briefs in several campaign-finance cases before this Court, including *Citizens United v. FEC*, 558 U.S. 310 (2010); *Davenport v. Washington Education Association*, 551 U.S. 177 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); and *McConnell v. FEC*, 540 U.S. 93 (2003). The Institute believes that its legal perspective will provide this Court with valuable insights regarding the burdens that the biennial aggregate contribution limits impose on First Amendment rights.[1]

---

[1] All parties have consented to the filing of this brief. The Institute affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that restrictions on the financing of political speech could be justified by a government interest in preventing not just political corruption, but also the appearance of such corruption. Since then, this Court and lower courts have repeatedly invoked the twin concerns of "corruption or its appearance" as a justification for campaign-finance laws. But while these interests are generally invoked together, it is clear that, from *Buckley* to the present, courts upholding campaign-finance laws have allowed the "appearance of corruption" to do virtually all of the heavy lifting, and have rarely inquired into whether such laws were justified by any record of genuine corruption. *See, e.g.*, Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 135 (2004) (noting that "few campaign finance regulations would pass constitutional scrutiny" if their defenders had to demonstrate actual corruption).

This case is no different; the government invokes the "interests in combating corruption and its appearance" as a basis for upholding the federal biennial aggregate contribution limits. Mot. to Dismiss or Affirm at 17. But despite the fact that a majority of states do not have aggregate contribution limits, the government below did not identify even a single incident of corruption related to large aggregations of contributions that were otherwise legal. Instead, this

is yet another case in which the government expects the hypothetical and unquantifiable risk of the "appearance of corruption" to do all the work necessary to justify restrictions on political contributions.

This brief challenges that expectation, and argues, to the contrary, that the appearance-of-corruption standard is an insufficient basis for upholding any campaign-finance law, including the biennial aggregate limits under review in this case. As this brief will explain, the notion that the government has an important or compelling interest in preventing the supposed appearance of corruption is incompatible with basic notions of representative government. In many cases, the alleged appearance of corruption is indistinguishable from the appearance of partisanship or political bias, both features of our representative system that are not merely unavoidable, but are in fact desirable. Further, regulations aimed at preventing the mere appearance of corruption among elected officials – even when they target the appearance of *quid pro quo* corruption – have had the practical effect of depriving citizens of important information about the state of their government.

The appearance-of-corruption standard is also incompatible with First Amendment values. The First Amendment demands tolerance for speech that upsets people, yet the appearance-of-corruption standard allows the suppression of peaceful modes of expression simply because people find it upsetting. The First Amendment demands objectivity in regulation, yet the appearance-of-corruption standard is subjective

and malleable. And the First Amendment demands that government produce evidence to justify its restrictions on speech, yet the appearance-of-corruption standard has relieved government of this burden, permitting regulation based on anecdote, speculation, and conjecture.

These fundamental flaws justify abandoning the appearance-of-corruption standard. Doing so will not only simplify the resolution of this case, it will provide much-needed clarification to lower courts that, 37 years after *Buckley*, are still struggling to determine just how much peaceful political activity the government may ban in its seemingly never-ending quest to eradicate the alleged appearance of corruption.

ARGUMENT

Warnings against reaching judgments based on appearances stretch back to antiquity. *See*, *e.g.*, Aesop, *The Wolf in Sheep's Clothing* (circa 550 B.C.); *John* 7:24 (King James) ("Judge not according to the appearance, but judge righteous judgment."). Equally ancient – and well known to the Founding generation – are warnings against placing uncritical trust in government. *See*, *e.g.*, Cato, *Letter VII* (1787), *reprinted in The Anti-Federalist Papers* 321, 324 (Ralph Ketcham ed. 2003) (quoting Demosthenes' second Philippic oration, "[T]here is one common bulwark with which men of prudence are naturally provided,

the guard and security of all people, particularly of free states, against the assaults of tyrants – What is this? Distrust."). In keeping with these warnings, "[t]he American political tradition is . . . based in large measure on a healthy mistrust of the state." Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 656 (1989). *See also* James Madison, *James Madison's Notes of the Constitutional Convention* (July 11, 1787), *available at* http://www.consource.org/document/james-madisons-notes-of-the-constitutional-convention-1787-7-11/ ("[A]ll men having power ought to be distrusted to a certain degree.").

Nevertheless, in *Buckley v. Valeo*, this Court concluded that the government had an important interest in preventing not only *quid pro quo* corruption, but even the appearance of such corruption, due to the risk that such appearances might ultimately lead to distrust in government. 424 U.S. 1, at 26-27 (1976). Since then, the appearance-of-corruption standard has spawned confusion and contradictory rulings both in this Court and lower courts, and it has done so at great cost to the marketplace of political ideas. The result has been a "never-ending and self-justifying process" of greater and greater regulation of peaceful political activity. *McConnell v. FEC*, 540 U.S. 93, 269 (2003) (Thomas, J., dissenting).

This case presents an opportunity to take a different tack and provide much-needed clarity to campaign-finance jurisprudence. It is an opportunity that this Court should seize. As explained below, the government has neither a "compelling"

nor an "important" interest in combatting the mere appearance of corruption. Indeed, the appearance-of-corruption standard is inconsistent with representative government and with multiple, basic First Amendment principles. It is time that it be abandoned.

I. The Appearance-of-Corruption Standard Is Inconsistent with Representative Government.

The appearance-of-corruption standard is most strongly associated with this Court's ruling in *Buckley v. Valeo*. As explained below, however, that standard actually originated with earlier codes of ethics for judges and executive-branch employees that focused not on *quid pro quo* corruption, but on more generic bias and favoritism. *Buckley* extended that standard beyond these contexts, into the realm of electoral politics. In doing so, the Court ignored the difference between bureaucrats and judges, who are expected to neutrally administer the law, and elected representatives, who are expected – indeed, elected – to behave as biased partisans. But the appearance-of-corruption standard does not merely misconceive the role of elected representatives in our constitutional system, it empowers these incumbent politicians to deprive voters of critical information about the state of their government and to do so in a way that serves both to insulate them from electoral challenge and to perpetuate the abuse of government power.

A. The modern appearance-of-corruption standard is an unwarranted expansion of conflict-of-interest rules for judges and federal employees that has no proper application to elected representatives.

Buckley was not the first case to discuss "appearances" as they relate to the activities of government officials. Early efforts to regulate the "appearance of impropriety" can be traced back to 1924, when, in the wake of the Black Sox scandal, the American Bar Association instructed judges acting in their official capacity to avoid "the appearance of impropriety." *See* Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 Stan. L. Rev. 593, 597-98 (1992). This standard was later extended to federal conflict-of-interest rules that regulated the conduct of executive-branch employees. *Id.* at 598-603. The Kennedy administration, for example, issued regulations directing federal employees to avoid even the appearance of financial conflicts of interest, *id.* at 599-600, and President Johnson issued an executive order directing federal employees to avoid any action which "might . . . affect[ ] adversely the confidence of the public in the integrity of Government." Exec. Order No. 11,222, 3 C.F.R. 306 (1964-1965), *revoked* Exec. Order No. 12,674, 3 C.F.R. 215 (1990).

This Court considered these sorts of regulations in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), which appears to be the first case in which this Court acknowledged something

like the appearance-of-corruption standard for federal employees. *Mississippi Valley* involved a claim for damages for the cancellation of a government contract. The Government defended by arguing that the contract was unenforceable because a government employee involved in the negotiations had a conflict of interest in violation of a federal conflict-of-interest statute. In holding the contract unenforceable, the Court cited the concern that the public's "faith in those who govern" might be "shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *Id.* at 562.

Mississippi Valley was not a First Amendment case and was not cited in *Buckley v. Valeo*, but the case that ultimately was cited in *Buckley* to support the appearance-of-corruption standard says much the same thing. That case, *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), dealt with the constitutionality of regulations adopted under the Hatch Act. Those regulations provided that "[t]he head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in [certain partisan political activities], if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or *apparent* conflict of interests." *Id.* at 576 n.21 (emphasis added). In upholding those regulations, this Court held that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the

public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* at 565.

In *Buckley v. Valeo*, this Court extended the principles announced in *Letter Carriers* to the realm of partisan elections. 424 U.S. at 27. But in doing so this Court failed to consider the very different roles played by civil servants and judges, on one hand, and elected representatives, on the other. Civil servants' and judges' primary duty is to the law, which they are expected – and in many cases constitutionally required – to administer neutrally, without bias or favoritism. *See Letter Carriers*, 413 U.S. at 564-655 ("[E]mployees in the Executive Branch of the Government, or those working for any of its agencies . . . are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof."); *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) ("All judges take an oath to uphold the Constitution and apply the law impartially[.]"). Elected representatives, by contrast, are not expected to be impartial or apolitical. Indeed, our entire system of partisan elections is premised on the notion that, once in office, elected representatives are expected to behave as partisans and represent the various constituencies that helped them get elected.

This Court's recognition of these different roles is well illustrated by this Court's recent decisions in *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868

(2009), and *Citizens United v. FEC*, 558 U.S. 310 (2010). Both cases involved independent political expenditures. In *Caperton*, this Court held that, in some circumstances, large independent expenditures in support of judicial candidates may require those candidates to recuse themselves from cases involving litigants who funded the expenditures. But this Court saw no similar danger from independent expenditures in *Citizens United* precisely because of the nature of representative politics:

> Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters *and contributors* who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, *or to make a contribution to*, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

Citizens United, 558 U.S. at 359 (quoting *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.)) (emphasis added).

As *Citizens United* also makes clear, another difference between campaign-finance laws and judicial-recusal standards is the impact of the regulations on non-government actors. Campaign-finance laws like the biennial aggregate limit impose broad

prophylactic restrictions and they do so on people who are not government actors. This includes not only campaign contributors, but also non-incumbent candidates. Conflict-of-interest rules and judicial-recusal standards, by contrast, are substantially narrower; they are remedial, rather than prophylactic, and they limit only the behavior of government actors. *See Citizens United*, 558 U.S. at 360 ("*Caperton*'s holding was limited to the rule that the judge must be recused, not that the litigant's political speech could be banned."); *cf. Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2347-50 & n.3 (2011) (discussing the history of legislative- and judicial-recusal rules, and noting that "restrictions on . . . speech during elections are a different matter").

In short, *Buckley*'s extension of the appearance-of-corruption standard from federal employees and judges to elected officials was too hasty. It has tended to hold elected officials to an appearance of impartiality that is not applicable to elected representatives, and it has ignored the fact that the burdens of campaign-finance laws are not borne by representatives alone, but are also borne by the contributors who are prevented from associating with the candidates of their choice.

B. When applied to elected representatives, the appearance-of-corruption standard deprives the public of important information about the state of the government.

As discussed above, much of what proponents of campaign-finance restrictions deride as the "appearance of corruption" is nothing more than the generic favoritism and influence that is at the heart of representative politics. But even to the extent the public is upset by what it believes to be the appearance of *quid pro quo* corruption, that problem is less about campaign financing and more about the unchecked ability of politicians to reward powerful supporters. *See* Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap. L. Rev. 173, 173 (2003) ("[M]odern government has a lot to offer, and its constituents are increasingly all too eager to pursue it."). Some of those supporters will be financial backers, but others will be heads of civic or advocacy groups, prominent politicians, celebrities, or other sources of election-year support. Financial supporters are surely the most easily identified members of this cohort, but there is absolutely no reason to believe they are its *only* members. Restrictions on campaign financing designed to eliminate the "appearance of corruption" do not address the core problem of seemingly corrupt favoritism – they simply cover up its most visible manifestation, allowing the rest to continue unobserved.

Covering up the potential for abuse of government power in order to lull the public into a false sense of trust is not a legitimate use of government power. To the contrary, as explained below, the suspicion engendered by the appearance of corruption is a healthy part of our constitutional system; it makes citizens alert to opportunities for abuse and enables voters to respond at the ballot box. Government efforts to short-circuit this process by stamping out the appearance of corruption deprive voters of necessary information, and, not coincidentally, make it more difficult to remove incumbents from office.

It is important to note, first, that the appearance-of-corruption standard only does work when the underlying activities are not *actually* corrupt. "If the campaign finance system leads to actual corruption, then that may be a constitutionally sufficient justification for the state to infringe on free speech rights, in which case the 'appearance of corruption' basis is superfluous." Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L.J. 1049, 1067 n.113 (1996). Thus, the question raised by the appearance-of-corruption standard is whether the government has a compelling or important interest in prohibiting peaceful political activity that is not, in fact, corrupt, but that nevertheless raises the public's suspicions.

The answer to that question is surely no. The appearance of *quid pro quo* corruption does not arise in a vacuum; it arises where there are opportunities to abuse government power for private gain.

Antecedent to this, however, is government power itself, which carries with it the opportunity for such abuse. *See* Letter from John Emerich Edward Dalberg, Lord Acton, to Bishop Mandell Creighton (Apr. 5, 1887) ("Power tends to corrupt, and absolute power corrupts absolutely."), *available at* http://oll.libertyfund.org/title/2201/203934; Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in James Madison: Writings*, at 418, 421 (Jack N. Rakove ed. 1999) ("Wherever there is an interest and power to do wrong, wrong will generally be done. . . ."). For this very reason, if voters believe that political contributions appear corrupt, they have received an important signal; they have been reminded of the dangers that are inherent in whatever amount of power has been delegated to the government. *Cf.* Stephen Ansolabehere & James M. Snyder, Jr., *Money and Institutional Power*, 77 Tex. L. Rev. 1673, 1673 (1999) (arguing that political money will tend to follow institutional power).

Because government power in the United States is supposed to be constrained by constitutional limits, the public has an interest in monitoring the appearance of corruption. If the appearance of corruption is on the rise, it suggests that government power has exceeded those limits. And, indeed, "the abandonment of limitations on federal power has led to greater special-interest pressure in no small part simply because it has made the federal government more attractive to lobby." Peter W. Morgan & Glenn H. Reynolds, *The Appearance of Impropriety: How the*

Ethics Wars Have Undermined American Government, Business, and Society 193 (1997). *See also* John R. Lott, Jr., *A Simple Explanation for Why Campaign Expenditures Are Increasing: The Government Is Getting Bigger*, 43 J.L. & Econ. 359 (2000) (arguing that growth in campaign spending is attributable, in significant part, to growth in the federal budget). This, in turn, "has caused many Americans to fear, rightly, that many federal programs are simply disguised ways for the well-connected to pick their pockets, or otherwise push them around." Morgan & Reynolds, *supra*, at 193.

If the public believes that government has exceeded its constitutional limits and that public power is routinely being used to serve private ends, the public may well be motivated to take political action to restore those limits. Thus, the appearance of *quid pro quo* corruption might be thought of as the canary in the constitutional coal mine. Just as coal miners would understandably be alarmed to see their canary looking unwell, Americans are understandably alarmed by what they believe to be the appearance of *quid pro quo* corruption. But what the appearance-of-corruption standard ignores is that these are situations in which people *should* be alarmed. The government is no more justified in eliminating the appearance of corruption to improve public confidence in democracy than a mine foreman would be justified in removing an unwell canary to improve employee confidence in safety conditions. In either case, the underlying danger – be it unchecked government

power to dispense political favors or toxic gas – remains. The only difference is that those who stand to be harmed have been made unaware of that danger.

In such a situation, one cannot help but question Congress's motives in attempting to eliminate the appearance of corruption. And, indeed, the debates surrounding the enactment of the Federal Election Campaign Act, which first imposed biennial aggregate limits on contributions to federal candidates, suggest that the harm most feared by many of its supporters was not an abstract harm to democracy, but rather the harm to their own reputations that would be caused by their ability to dispense political favors:

- Senator George McGovern: "[T]hose of us who run for office can profess that the campaign contributions we receive do not in any way control our votes, but I venture to say that not many believe it." 120 Cong. Rec. S4553 (daily ed. Mar. 27, 1974).

- Senator Hugh Scott: "Regardless of the motives of the donor, or the intentions of the recipient candidate, there appears to be an appearance of impropriety. I regret that this is so, because such charges are usually unfounded, but like the proverbial wife of Julius Caesar, we must be above and beyond reproach." *Hearings on S. 1103, S. 1954, S. 2417, & S.3 Before the Subcomm. on Privileges & Elections*

of the S. Comm. on Rules & Admin., 93d Cong. 33 (1973).

- Senator James Abourezk: "It is really the appearance of corruption that harms *us*, I think, more than any corruption that does go on, because there are certain controversial amendments up today that I would like to vote for, but because I received contributions from dairy farmers around the country, I am almost afraid to vote for them because it is set up now in the press that anybody who does vote for them who has taken money from the dairy farmers has been bought off." *Hearings on S. 372 Before the Subcomm. on Privileges & Elections of the S. Comm. on Rules & Admin.*, 93d Cong. 207 (1973) (emphasis added).

- Senator Philip Hart: "I like to think that I have never been influenced by a political contribution. But I am darn sure that there are many people in Michigan who believe I have been. I am just certain that when they look at my returns and see substantial labor contributions that they say, 'That is why he votes the way he does.'" *Federal Election Campaign Act of 1973: Hearings on S. 372 Before the Subcomm. on Commc'ns of the S. Comm. on Commerce*, 93d Cong. 78 (1973).

To be sure, elected officials may well prefer to wield government power without fear that voters will

become suspicious of them. *See* John Samples, *The Fallacy of Campaign Finance Reform* 112 (2006) (observing that, under the appearance-of-corruption standard, "[t]he presumption of liberty becomes . . . a concern of public relations."). But it seems unlikely that the Founders would have considered promoting this sort of trust to be a sufficient basis for restricting individual liberty. Indeed, the Founders were well aware that government power could be used to benefit favored political factions but wisely rejected restrictions on liberty as a means of addressing that problem:

> Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The Federalist No. 10, at 73 (James Madison) (Clinton Rossiter ed., 1961).

It may be the case that the appearance of corruption is an unavoidable symptom of having an expansive government that wields enormous power to dispense political favors or punishment. But unpleasant symptoms, while distressing to those who suffer from them, also make those people more acutely aware of underlying problems and, in turn, allow them to take action to address those problems. *Cf.* William Manchester, *The Last Lion: Winston Spencer*

Churchill, Visions of Glory 1874-1932, 348 (1983) (quoting Churchill, "Criticism may not be agreeable, but it is necessary. It fulfills the same function as pain in the human body. It calls attention to an unhealthy state of things."). The appearance-of-corruption standard has allowed government to cut off this process in the political realm, undermining the ability of the People to monitor the growth of government power and the dangers that attend it. It is doubtful that those who wrote and ratified the Constitution would have considered the concealment of evidence of the expansion of government from the public to be even a legitimate interest – let alone an "important" or "compelling" one.

II. The Appearance-of-Corruption Standard Conflicts with Basic First Amendment Principles.

In addition to undermining the ability of Americans to monitor the growth of government power, the appearance-of-corruption standard conflicts with several fundamental First Amendment principles. As discussed below, the appearance-of-corruption standard encourages the prohibition of modes of political expression based entirely on public opinion, is inherently subjective, and invites reliance on unreliable evidence (or even pure speculation and conjecture). In short, the appearance-of-corruption standard provides none of the protection that the First Amendment demands.

A. The appearance-of-corruption standard permits the prohibition of modes of speech and association merely because the public does not like them.

There are few propositions more fundamental in First Amendment law than that political speech and association cannot be restricted merely because they are upsetting or unpopular. *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) ("As a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2828 (2011) ("[T]he whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority."); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000) ("The First Amendment protects expression, be it of the popular variety or not."). The appearance-of-corruption standard turns this fundamental principle on its head by allowing speech and association to be restricted based exclusively on the fact that the public – or the subset of the public vocal enough to capture the attention of legislators – does not care for it.

As discussed above, *supra* I.B., the appearance-of-corruption standard only does work when the underlying activities are not demonstrably corrupt. And it is no answer to say that the appearance-of-corruption standard is necessary because genuine corruption is difficult to detect. This Court has, in contexts far removed from the political speech that

lies at the core of First Amendment protection, squarely rejected the notion that "[p]rotected speech . . . become[s] unprotected merely because it resembles the latter." *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (rejecting argument that prohibition on virtual child pornography was necessary because of the difficulty of distinguishing it from actual child pornography). Thus, regulating appearances cannot be justified as a prophylaxis against actual corruption.

Instead, the appearance-of-corruption standard is premised on the notion that some modes of peaceful political speech and association – such as the making of political contributions – may be prohibited based purely on the fact that the public is disturbed by those modes of speech and association. But this, too, runs headlong into well established First Amendment precedent, most notably, *Texas v. Johnson*, 491 U.S. 397 (1989), and *United States v. Eichman*, 496 U.S. 310 (1990).

In *Texas v. Johnson*, this Court considered the constitutionality of a Texas law that prohibited flag desecration. Texas defended the law by arguing, in part, that the law did not seek to prohibit all words or expressive conduct critical of the flag or national unity, but rather that the law merely prohibited a particularly offensive mode of expressive conduct that, if left unchecked, may threaten national unity. 491 U.S. at 416. This Court rejected that argument, observing that the "enduring lesson [of this Court's decisions] that the government may not prohibit

expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea." *Id.* at 416.

This Court reaffirmed that lesson the following term, when, in *Eichman*, it invalidated a similar federal prohibition on flag desecration. As the Court noted, while government may seek to foster "[n]ational unity . . . by persuasion and example," it may not do so by proscribing otherwise peaceful political speech and association because of its "likely communicative impact." 496 U.S. at 318 (quotation marks and citations omitted).

The appearance-of-corruption standard cannot be reconciled with the principles announced in these cases. If expressive conduct cannot be prohibited on the grounds that it will undermine "national unity," then surely it cannot be prohibited on the virtually identical grounds that it will lead to "cynical assumption[s]" about government. *Compare Johnson*, 491 U.S. at 413, *with Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000). Nevertheless, that is the aberrant holding of this Court's campaign-finance cases. As in *Eichman*, it is a holding that is "foreign to the First Amendment." 496 U.S. at 318.[2]

---

[2] To make matters worse, this holding is also in conflict with the overwhelming majority of empirical studies, which have found virtually no relationship between trust in government or political efficacy and political contributions or spending. *See, e.g.*, David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence From the States*, 5 Election L.J.

(Continued on following page)

B. The appearance-of-corruption standard lacks objectivity and has created confusion in lower courts.

The danger that political activity will be banned merely because it is unpopular is exacerbated by the fact that the appearance-of-corruption standard is wholly indeterminate. If the decades-long debate over campaign-finance law has proved anything, it is that the "appearance of corruption" is entirely in the eye of the beholder. For some observers – including this *amicus* – political contributions are a venerable form of political association. Others – some of whom will undoubtedly file *amicus* briefs defending the constitutionality of the biennial aggregate contribution limits – denigrate political contributions as little more than "legalized bribery." *See, e.g.*, Fred Wertheimer, *Supreme Court Could Create System of Legalized Bribery in Washington Depending on Its Decision in McCutcheon Case*, The Huffington Post (Feb. 21, 2013 5:02 p.m.), http://www.huffingtonpost.

---

23 (2006) (finding no significant effect of campaign-contribution limits on political efficacy); Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 122 (2004) (concluding that "trends in general attitudes of corruption seem unrelated to anything happening in the campaign finance system"); David M. Primo, *Campaign Contributions, and Appearances of Corruption, and Trust in Government, in Inside the Campaign Battle: Court Testimony on the New Reforms*, 285, 290 (A. Corrado *et al.* eds., 2003) (finding virtually no relationship between campaign spending and trust in government during the period after 1980).

com/fred-wertheimer/campaign-finance-supreme-court_b_2734007.html.

These disagreements are not surprising. The members of this very Court, after all, have long disagreed on what constitutes *actual* corruption. *Compare, e.g., Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 659-60 (1990) (holding that "distortion" caused by corporate political spending is a form of corruption) *with Citizens United*, 558 U.S. 310, 364 (2010) (rejecting the anti-distortion theory of corruption). The even more amorphous concept of the "appearance of corruption" is even less susceptible to objective evaluation.

The inherent subjectivity of the appearance-of-corruption standard makes it incompatible with the First Amendment. This Court has repeatedly stressed the importance of objective standards when First Amendment rights are at stake. *See, e.g., Snyder*, 131 S. Ct. at 1219 ("'Outrageousness,' however, is a highly malleable standard with 'an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.'" (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988))); *Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989) ("Any governmental attempt to serve purely esthetic goals by imposing subjective standards of acceptable sound mix on performers would raise serious First Amendment concerns. . . ."); *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("A 'dignity' standard . . . is so inherently subjective that it would

be inconsistent with 'our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience.'"). Indeed, the importance of objectivity in regulation has been expressly noted in the campaign-finance context. *See FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 468 (2006) (plurality opinion) ("To safeguard th[e] liberty [protected by the First Amendment], the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and *effect*." (emphasis added)).

Without objective standards against which to evaluate restrictions on political speech and association, lower courts can reach opposite conclusions even when cases involve virtually identical laws. And, indeed, this is precisely what has happened under the appearance-of-corruption standard. The decisions of the Second and Fourth Circuits in *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010), and *Preston v. Leake*, 660 F.3d 726 (4th Cir. 2011), are illustrative. Both cases involved total prohibitions on political contributions from registered lobbyists. The Second Circuit concluded that "there is insufficient evidence to demonstrate that all lobbyist contributions give rise to an appearance of corruption," *Green Party of Conn.*, 616 F.3d at 207, and thus struck down Connecticut's prohibition. The Fourth Circuit, by contrast, concluded that "[*a*]*ny payment* made by a lobbyist to a public official, whether a campaign contribution or simply a gift, calls into question the

propriety of the relationship, and therefore North Carolina could rationally adjudge that it should ban *all* payments." *Preston*, 660 F.3d at 737.

This is not the only instance in which federal courts, attempting to apply the appearance-of-corruption standard to campaign-finance laws, have reached divergent outcomes. This Court in *Arizona Free Enterprise Club*, 131 S. Ct. 2806, was forced to resolve a similar circuit split regarding the constitutionality of public-financing "matching funds" programs. *Compare McComish v. Bennett*, 611 F.3d 510, 526 (9th Cir. 2010) (upholding system of public-financing matching funds because "it is clear that the Act's anticorruption interest is further promoted by" incentivizing participation in the public-financing system) *with Scott v. Roberts*, 612 F.3d 1279, 1292 (11th Cir. 2010) (striking down system of public-financing matching funds where "[t]he parties ha[d] not sufficiently explained how the Florida public financing system further[ed] the anticorruption interest"). And in *Randall v. Sorrell*, this Court was forced to reverse a ruling by the Second Circuit, which had concluded, in conflict with decades of precedent, that limits on campaign expenditures were a permissible means of combatting the appearance of corruption. *See* 548 U.S. 230, 244 (2006) (plurality opinion), *rev'g Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2002).

Federal courts operating in good faith will, of course, sometimes disagree about the constitutionality of laws that restrict speech and association. But the

risk of their doing so is increased – and their task made unnecessarily difficult – when the legal standards they are instructed to apply are by their very nature indeterminate. The appearance-of-corruption standard, which provides insufficient guidance to be applied predictably or objectively, is just such a standard.

C. The appearance-of-corruption standard invites reliance on unreliable evidence, or on no evidence at all.

Because the appearance-of-corruption standard is itself indeterminate, it should come as no surprise that courts attempting to determine the presence or absence of the appearance of corruption are often at sea when it comes to what evidence can or should be considered. And although this Court has stated in other contexts that the government's burden in First Amendment cases cannot be carried "by mere speculation or conjecture," *Edenfield v. Fane*, 507 U.S. 761, 770 (1993), that is precisely the effect that the appearance-of-corruption standard has had.

The evidence-free nature of the appearance-of-corruption standard can be seen in the procedural posture of this case, which was appealed to this Court from a motion to dismiss, and in the government's own briefing, which does not cite even a single incident of actual corruption associated with large *aggregate* contributions. Because a majority of states do not have aggregate contribution limits, such evidence would

presumably be easy to demonstrate if it existed. But under the appearance-of-corruption standard, such showings are almost never required.

This is well illustrated by federal courts' reliance on anecdotal reports in newspapers to establish the appearance of corruption. This occurred most notably in *Nixon v. Shrink Missouri Government PAC*, in which this Court upheld Missouri's campaign-contribution limits largely on the basis of newspaper clippings. 528 U.S. 377, 393-94 (2000). "Whether the newspaper clippings were accurate or inaccurate, well-balanced or cockeyed, apparently did not matter, because they at least showed what people *believed* [about the role of money in politics]." Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 176 (2001). *See also* Persily & Lammie, *supra* n.2, at 129-30 (describing the "typical and typically vacuous" newspaper articles submitted as evidence of the appearance of corruption in *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000)).

Nixon's reliance on newspaper reports highlights another troubling aspect of the appearance-of-corruption standard: the danger that proponents of campaign-finance restrictions can, in effect, invent evidence through their own advocacy. "[T]he most zealous and aggressive advocates of restriction can make accusations, whether well founded in fact or not, and then use the very fact that some people believe the charges as a reason to justify regulation."

Levin, *supra*, at 178. In other words, "[p]olitical combat can create its own appearances." *Id.*

Nixon also demonstrates that the claim that a law combats the appearance of corruption is largely immune to being falsified. When the plaintiffs in *Nixon* "relied on political science studies to attack the law, Justice Souter did not examine them at any length, in part because of 'the absence of any reason to think that public perception has been influenced by the studies.'" *Id.* at 177 (quoting *Nixon*, 528 U.S. at 395). As one scholar has noted, this approach makes evidence virtually irrelevant under the appearance-of-corruption standard:

> If limits on contributions are permissible only in times and places where wide segments of the public believe that special interests exert too much influence over politics, then they are permissible in all times and places. The public always believes this, and it always will. Unless the Court modifies its language, the requirement of proof of need for restrictions might as well be rescinded entirely.

Id. at 178.

The absence of any serious evidentiary requirement under the appearance-of-corruption standard has, in other cases, led to inexplicable legal conclusions. In *Illinois Liberty PAC v. Madigan*, for example, the federal district court for the Northern District of Illinois concluded that it was likely constitutional for Illinois to impose a system of differential contribution

limits under which individual contributors could contribute only half the amount to political candidates that corporations were permitted to contribute. *See* No. 12 C 5811, 2012 U.S. Dist. LEXIS 144259 (N.D. Ill. Oct. 5, 2012) (denying motion for preliminary injunction). There was no evidence that individual contributions appeared more corrupt than corporate contributions; indeed, the court does not appear to have even paused to consider the question. Such is constitutional scrutiny under the appearance-of-corruption standard.

CONCLUSION

"[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright*, 321 U.S. 649, 655 (1994)). *Buckley v. Valeo*, to the extent it held that the government has a compelling interest in restricting peaceful political activity to combat the mere appearance of corruption, is just such a decision. By any measure, the appearance-of-corruption standard announced in *Buckley* has failed to deliver on any of the promises put forth by proponents of restrictive campaign-finance laws. It has given the government virtually a free hand to regulate or entirely ban peaceful political activity based on only the flimsiest evidence, in any at all. In exchange, Americans have received nothing – after more than 35 years of legislative attempts to outlaw the

appearance of corruption, Americans' trust in government "remains mired near a historic low." Pew Research Ctr. For People & the Press, *Majority Says the Federal Government Threatens Their Personal Rights* (Jan. 31, 2013), http://www.people-press.org/2013/01/31/majority-says-the-federal-government-threatens-their-personal-rights/. This Court can undo this pointless damage to Americans' First Amendment rights by holding that combating the mere appearance of corruption is not a compelling or important government interest, and that the federal biennial aggregate limits therefore cannot survive either strict or intermediate scrutiny.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR
PAUL M. SHERMAN*
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
psherman@ij.org

INSTITUTE FOR JUSTICE
FLORIDA CHAPTER
CLAUDIA MURRAY
999 Brickell Avenue
Suite 720
Miami, FL 33131
(305) 721-1600

**Counsel of Record*

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

RECORDS AND BRIEFS

JUL 25 '13

No. 12-536

In The Supreme Court of the United States

SHAUN MCCUTCHEON AND THE REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal From The United States District Court For The District of Columbia

BRIEF *AMICUS CURIAE* OF PROFESSOR LAWRENCE LESSIG IN SUPPORT OF APPELLEE

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Ste 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. THE CONSTITUTION'S TEXT, HISTORY, AND STRUCTURE REFLECT THE FRAMERS' BROAD INTEREST IN PREVENTING THE APPEARANCE AND REALITY OF CORRUPTION 5

A. In Drafting The Constitution, The Framers Were Keenly Concerned With Preventing Both "Dependence Corruption" And *Quid Pro Quo* Corruption 5

B. The Text Of The Constitution Provides Specific Restrictions Designed To Limit Temptations And Opportunities For Corruption In Government 11

C. The Constitution's Structure Was Designed To Erect "Every Practicable Obstacle" Against Corruption 15

II. CONSTITUTIONAL AMENDMENTS HAVE EXPANDED PROTECTION AGAINST CORRUPTION 21

III. COURT PRECEDENT REFLECTS THE FRAMERS' UNDERSTANDING THAT THE GOVERNMENT HAS BROAD AUTHORITY TO COMBAT CORRUPTION 26

CONCLUSION 32

TABLE OF AUTHORITIES

Page

Cases

Arizona v. Inter Tribal Council,
133 S. Ct. 2247 (2013) 8, 19

Buckley v. Valeo,
424 U.S. 1 (1976) ..... *passim*

Citizens United v. Fed. Election Comm'n,
558 U.S. 310 (2010) 3, 5, 23, 27

Ex Parte Yarbrough,
110 U.S. 651 (1884) 27

Fed. Election Comm'n v. Nat'l Conservative PAC,
470 U.S. 480 (1985) 28

McConnell v. Fed. Election Comm'n,
540 U.S. 93 (2003) 5, 11, 28, 30

Stromberg v. California,
283 U.S. 359 (1931) 22

Constitutional Provisions and Legislative Materials

U.S. CONST. art. I, § 2, cl. 2 14

U.S. CONST. art. I, § 3 23

U.S. CONST. art. I, § 3, cl. 3 14

U.S. CONST. art. I, § 4, cl. 1 19

TABLE OF AUTHORITIES—continued

Page

U.S. CONST. art. I, § 6, cl. 2 11

U.S. CONST. art. I, § 9, cl. 8 13

U.S. CONST. art. II, § 1, cl. 5 15

U.S. CONST. art. II, § 2, cl. 2 17

U.S. CONST. amend. I 23

U.S. CONST. amend. XXVII 27

120 CONG. REC. (1974) 30

Sen. Joseph Bristow, *The Direct Election of Senators*, in CONGRESSIONAL SERIAL SET ISSUE 6177 (U.S. G.P.O. 1912) 25, 26

Books, Articles and Miscellaneous

18 Op. Off. Legal Counsel 13 (1994) 13

AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) 22, 26

Zachary S. Brugman, *The Bipartisan Promise of 1776: The Republican Form and its Manner of Election* (2012) 20

THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION (ELLIOT'S DEBATES) (Jonathan Elliot ed.) (1836) .. 2, 6, 19, 20

TABLE OF AUTHORITIES—continued

Page

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed. 1966)..... *passim*

Lisa Hill, *Adam Smith and the Theme of Corruption*, 68 REV. POL. 636 (2006)..... 14

Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. 61 (2013)..... 14

LAWRENCE LESSIG, REPUBLIC, LOST (2011)..... 11, 14

DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA (2d ed. 1805) (1788)..... 13

THE FEDERALIST PAPERS (Clinton Rossiter ed. 2003)..... *passim*

Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, The Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671 (1999)..... 22, 23

James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174 (1994)..... 6, 7, 9

Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341 (2009)..... 7, 18

TABLE OF AUTHORITIES—continued

Page

John Joseph Wallis, *The Concept of Systematic Corruption in American History*, in CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY (Edward L. Glaeser & Claudia Goldin eds. 2006) 9

INTEREST OF *AMICUS CURIAE*[1]

Lawrence Lessig is Professor of Law at Harvard Law School and Director of the Edmond J. Safra Foundation Center for Ethics. He teaches constitutional law and institutional ethics, and his scholarship has analyzed corruption, the Constitution, and Court precedent. Professor Lessig is the author of REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011) and dozens of law review articles on constitutional law, including *What an Originalist Would Understand "Corruption" to Mean*, CAL. L. REV. (forthcoming 2013).

Professor Lessig's recent research into the Founders' conception of "corruption," which includes a catalogue of the instance and context of each use of the word "corruption" during the Founding debates, is the core of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant McCutcheon and the Republican National Committee (collectively "McCutcheon") contend that the federal aggregate contribution limits impose substantial burdens on First

---

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel made a monetary contribution to the brief's preparation or submission.

Amendment freedoms and cannot be justified by any constitutionally legitimate interest, and in particular, by the interest in avoiding corruption. McCutcheon Br. at 34-48. McCutcheon's argument, however, depends upon a modern understanding of the term "corruption," in sharp conflict with the term's original meaning.

The Framers viewed corruption as one of the greatest threats to government. They considered anti-corruption measures essential to an enduring republican system of government. As George Mason warned his fellow delegates at the Constitutional Convention, "if we do not provide against corruption, our government will soon be at an end." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 392 (Max Farrand ed. 1966) ("FARRAND'S RECORDS"). Thus, in drafting the Constitution, the Framers sought to ensure that "corruption was more effectually guarded against, in the manner this government was constituted, than in any other that had ever been formed." 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 302 (Jonathan Elliot ed. 1836) (Pinckney).

The Framers had a very specific conception of the term "corruption" in mind, one at odds with McCutcheon's more modern understanding of that term. For the Framers, "corruption" predicated of institutions as well as individuals, and when predicated of institutions, was often constituted by an "improper dependence." Having seen, for example, the English Parliament corrupted by its dependence on the King, the Framers crafted the

Constitution to avoid such improper dependencies. In the case of the House in particular, they sought an institution "dependent on the people alone," THE FEDERALIST NO. 52, at 294 (Madison) (Clinton Rossiter ed. 1961). Any conflicting dependence—such as upon foreign patrons—would "corrupt" that intended dependence, and in turn threaten to corrupt the nation's fledgling republican institutions.

Amicus's review of Framing-era usage of the word "corruption"—catalogued in the Appendix, which serves as a companion to the online interactive database http://ocorruption.tumblr.com, and submitted to this Court for the first time—demonstrates that the need to prevent such "dependence corruption" dominated the discussions of "corruption" over the adoption and ratification of the Constitution. This research establishes that (1) the Framers' dominant concern was the corruption of the institutions of government, not individuals; (2) the Framers recognized that democratic institutions could be corrupted through developing conflicting dependencies, as they had in England; and (3) corruption of individual officeholders by bribery or other forms of *quid pro quo* corruption was a real, but secondary, concern.

This historically more complete conception of corruption is perfectly consistent with this Court's precedents, including *Citizens United v. FEC*, 558 U.S. 310 (2010), and fully supports the constitutionality of the federal aggregate contribution limits challenged here. The aggregate limits, which permit an individual to make a total

of $123,200 in contributions in each two-year election cycle ($48,600 to candidates and $74,600 to political parties and non-party political committees), play a necessary role in securing a government free from corrupting dependence on high-dollar donors. By preventing massive hard money contributions to candidates and their political parties, the aggregate limits aim to prevent the very sort of improper dependence on outside forces that the Framers wrote the Constitution to check.

Since *Buckley v. Valeo*, 424 U.S. 1 (1976), it has been settled law that the government has broad leeway to regulate campaign contributions, including by establishing aggregate contribution limits, to limit opportunities for corruption. While the limited burden on the freedom of speech in this case counsels intermediate scrutiny at most, any level of First Amendment scrutiny should take into account that the government's interest in combating real and apparent corruption is deeply rooted in the Constitution's text, history, and structure. *Amicus* respectfully submits that Congress's aggregate contribution limits serve this long-established, anti-corruption interest by diminishing candidates' and political parties' dependence on high-dollar donors, reducing opportunities for individual corruption, and restoring public trust in government.

ARGUMENT

I. THE CONSTITUTION'S TEXT, HISTORY, AND STRUCTURE REFLECT THE FRAMERS' BROAD INTEREST IN PREVENTING THE APPEARANCE AND REALITY OF CORRUPTION.

Under established law, the government's interest in preventing the appearance and reality of corruption is properly implemented by imposing limits on campaign contributions, direct money transfers that pose the gravest risk of corruption. *See Buckley*, 424 U.S. at 26; *McConnell v. FEC*, 540 U.S. 93, 143-44 (2003); *Citizens United*, 558 U.S. at 357; *see also* FEC Br. at 17-19, 26-28, 31-33. The text, history, and structure of the Constitution provide strong support for a broad interest that justifies contribution limits—both on the size and aggregate total amount—in order to prevent corruption.

A. In Drafting The Constitution, The Framers Were Keenly Concerned With Preventing Both "Dependence Corruption" And *Quid Pro Quo* Corruption.

Corruption was a core concern that informed much of the Framers' design of the Constitution. Alexander Hamilton explained that in drafting the Constitution, "[n]othing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption." THE FEDERALIST No. 68, at 380. Because the Framers

understood that "[t]hese most deadly adversaries of republican government" could be "expected to make their approaches from more than one quarter," *id.*, they designed the Constitution to include as many protections against corruption as possible. "[T]here was near unanimous agreement [among the delegates at the convention] that corruption was to be avoided, that its presence in the political system produced a degenerative effect, and that the new Constitution was designed in part to insulate the political system from corruption." James D. Savage, *Corruption and Virtue at the Constitutional Convention*, 56 J. POL. 174, 181 (1994).

The Framers viewed the American Revolution as a fresh start from the corruption they saw as endemic to government in England. *See* 1 FARRAND'S RECORDS 380 ("I admire many parts of the British constitution and government, but I detest their corruption.") (Mason). In their view, the core problem in England was that Parliament was not dependent on the people because of its conflicting dependence on the King. The King's power to select a large number of members from "rotten boroughs" and to dole out patronage appointments corrupted the House of Commons, preventing it from serving as the voice of the people. *See* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS 264 (explaining that this "dependence on [the King]" was "the true source of the corruption which has so long excited the severe animadversion of zealous politicians and patriots") (Hamilton).

Because of their experiences with England, a central preoccupation of the Framers was ensuring that the democratic components of the new republic they were creating would be dependent on the people alone. To achieve this goal, they both limited opportunities for corruption and provided the federal government with powers adequate to stamp out any new forms of corruption that might arise. Indeed, the decision to hold a Constitutional Convention separate from the ordinary processes established under the Articles of Confederation was in part a reaction to the perceived corruption of state legislatures. *See* 2 FARRAND'S RECORDS 288 ("What led to the appointment of this Convention? The corruption & mutability of the Legislative Councils of the States.") (Mercer).

James Madison's notes of the Constitutional Convention record that 15 delegates used the term "corruption" no fewer than 54 times, and seven of the most prominent delegates, including Madison, Governeur Morris, George Mason, and James Wilson, accounted for the vast majority of those usages. Savage, 56 J. POL. at 177. Corruption was an express topic of concern on almost a quarter of the days that the members convened. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 352 (2009).

But in speaking of "corruption," the Framers thought in institutional terms. Corruption "referred 'less to the actions of individuals' than to the general moral health of the body politic judged according to 'distributions of wealth and power, relationships between leaders and followers, the

source of power, and the moral right of rulers to rule." Lisa Hill, *Adam Smith and the Theme of Corruption*, 68 REV. POL. 636, 636-37 (2006). The corruption the Framers were concerned about was, like the corruption Adam Smith criticized, "more of a systemic problem" than an individual one. *Id.* at 650. Hence, one of the Framers' primary concerns in writing the Constitution was to ensure that the critical institutions of the new federal government—in particular the House of Representatives and the President—were "dependent upon the people alone." THE FEDERALIST NO. 52, at 294 (Madison). *See also Arizona v. Inter Tribal Council*, 133 S. Ct. 2247, 2258 (2013) (quoting Madison). As their experiences in England taught them, the Framers knew that avoiding conflicting dependencies that would compromise the nation's new republican institutions was critical to preventing corruption.

The Framers were well aware that "[i]n republics, persons elevated from the mass of the community by the suffrages of their fellow-citizens to stations of great pre-eminence and power may find compensations for betraying their trust." THE FEDERALIST NO. 22, at 117 (Hamilton). In line with first principles of republican government, the answer to this endemic problem was to create a system of government, dependent on "the great body of the people" and "not [on] an inconsiderable proportion or a favored class of it," THE FEDERALIST NO. 39, at 209 (Madison), in which "every practical obstacle should be opposed to cabal, intrigue, and corruption." THE FEDERALIST NO. 68, at 380 (Hamilton).

The Framers were not detached from the rough and tumble world of politics, and they approached the problems of corruption with a real-world understanding of political systems and their potential to either foster or restrain corruption. "When the delegates spoke of corruption at the convention they did so in a manner that reflected classical republican concerns about dependency, cabals, patronage, unwarranted influence, and bribery." Savage, 56 J. POL. at 181.

But among these various "classical republican concerns," some were more prominent than others. Empirical evidence from the debates over the adoption and ratification of the Constitution demonstrate that the Framers were more "concerned" with institutional, rather than individual corruption, and that improper "dependence" was most familiar type of institutional corruption.

The Appendix to this brief collects every use of the term "corruption" within the standard Framing-era documents. Of the 325 usages identified, in more than half—57% of cases—the Framers were discussing corruption of institutions, not individuals. By contrast, discussion of *quid pro quo corruption* was rare—only six instances, all of them focused on corruption of individuals. *See* Appendix at 23a. No doubt these two types of corruption were related. "By eliminating systematic corruption, they hoped to mitigate the problems of venal corruption as well." John Joseph Wallis, *The Concept of Systematic Corruption in*

American History, in CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 23, 25 (Edward L. Glaeser & Claudia Goldin eds., 2006). But whether or not related, they were still distinct.

As the Appendix shows, while the Framers understood that corruption could arise from acts of *quid pro quo* corruption by officeholders, it could also arise when government institutions had an improper, conflicting dependence. In at least 29 instances, the Framers spoke of corruption in exactly this way—five times the frequency of discussion of *quid pro quo* corruption. *See* Appendix at 21a-23a. Thus, the historical record demonstrates that the Framers understood the term "corruption" was not limited to instances of *quid pro quo* corruption, and was not ordinarily predicated of individuals, as opposed to institutions.

As explained below, the Framers' concern about corruption resulted in several distinct constitutional restrictions designed to reduce temptations and opportunities for corruption among public officials and block influences that would tend to compromise a "dependen[cy] on the people alone." THE FEDERALIST No. 52, at 294 (Madison). In addition, the Framers kept in mind their goal of discouraging corruption when designing the structure of the three branches of the federal government and the Constitution's system of representative democracy.

B. The Text Of The Constitution Provides Specific Restrictions Designed To Limit Temptations And Opportunities For Corruption In Government.

Whether or not a public official or an institution of government was actually tainted by a corrupting force, the public might reasonably question whether their representatives' loyalty remained with the public interest. Accordingly, the Framers did more than simply criminalize bribery of public officials—they wrote into the Constitution specific provisions that would prevent actual and apparent dependence as well as *quid pro quo* corruption. For the Framers, the "best means of prevention" was "to identify and to remove the temptation." *McConnell*, 540 U.S. at 153.

The Ineligibility and Emoluments Clause. The Constitution provides that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time." U.S. CONST. art. I, § 6, cl. 2. This constitutional restriction reflects the Framers' deep anxiety that legislators' temptation to secure future employment might cloud their duty to act in the public interest. "The core corruption the Framers wanted to avoid was Parliament's loss of independence from the Crown because the king had showered members of Parliament with offices and perks that few would have had the strength to resist." LAWRENCE

LESSIG, REPUBLIC, LOST 19 (2011). At the Convention, the delegates explained that this provision would "preserv[e] the Legislature as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption." 1 FARRAND'S RECORDS 386 (Rutlidge). The Framers did not want members of Congress to develop a conflicting dependency on the Executive Branch.

The delegates' decision that an express constitutional "precaution ag[ainst] intrigue was necessary" stemmed from their observations of the British experience, "where men got into Parl[iament] that they might get offices for themselves or their friends. This was the source of the corruption that ruined their Gov[ernment]." 1 FARRAND'S RECORDS 376 (Butler). George Mason supported the exclusion "as a corner stone in the fabric" of the Constitution and was "for shutting the door at all events ag[ainst] corruption," particularly in light of the "venality and abuses" that took place in this regard in Great Britain. *Id.* During ratification debates over the Constitution, James McHenry explained that the purpose of the provision was "to avoid as much as possible every motive for Corruption." James McHenry, *Speech before the Maryland House of Delegates* (Nov. 29, 1787), *in* 3 FARRAND'S RECORDS 148.

The Foreign Gifts Clause. The Constitution also mandates that "no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever,

from any King, Prince, or foreign State." U.S. CONST. art. I, § 9, cl. 8. This constitutional restriction, designed to ensure that officers were not dependent upon foreign kings, was a reaction to several instances between the Revolution and the Convention when American diplomats received valuable gifts from foreign dignitaries.[2] By reaching more broadly than simply outlawing bribery, these restrictions served as prophylactic measures that also targeted the appearance of corruption.

Describing these foreign gifts and the public debate that followed, Edmund Randolph explained during the ratification debates in Virginia that "[i]t was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states." DAVID ROBERTSON, DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA 330 (2d ed. 1805) (1788). These foreign gifts to prominent Americans in the 1780s were not considered *quid pro quo* corruption—Congress would surely not have allowed the diplomats to retain the gifts otherwise—but the gifts

---

[2] In 1780, U.S. Ambassador to France Arthur Lee received from King Louis XVI of France a portrait of the King set in diamonds atop a gold snuff box. *See* Applicability of Emoluments Clause to Employment of Gov. Employees by Foreign Public Univ., 18 Op. O.L.C. 13, 16 n.4 (1994). Lee turned the gift over to Congress, which resolved that he could keep it. *Id.* In 1785, Benjamin Franklin received a similar gift from the King of France, which Congress also allowed him to keep. *Id.* At the same time, Congress also allowed Secretary of Foreign Affairs John Jay to keep a gift of a horse from the King of Spain. *Id.*

nonetheless sent the wrong message to the American people, thus creating an appearance of corruption. Moreover, the Framers wanted to exclude "foreign influence" that could compromise the government's independence (or, more precisely, the government's intended dependence on the American people). *See* Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61, 70 (2013) ("The Framers didn't want a Congress that was a farm league for the French Riviera."). Indeed, the Framers had seen how the British government had become dependent on gifts from the French crown, "even if there was no clear quid pro quo tied to the gifts." LESSIG, REPUBLIC, LOST, at 19.

Eligibility Requirements for Elected Office. The Constitution's restrictions on candidates for elected office were designed to serve a gate-keeping function against possible sources of corruption. Beginning with Congress, the Constitution requires that a Representative or Senator must "be an Inhabitant of that State in which he shall be chosen." U.S. CONST. art. I, § 2, cl. 2; *id.* at § 3, cl. 3. This residency requirement was a response to the fear that wealthy non-residents would purchase elected office. George Mason explained that "[i]f residence be not required, Rich men of neighbouring States, may employ with success the means of corruption in some particular district and thereby get into the public Councils after having failed in their own State." 2 FARRAND'S RECORDS 218. Representatives were also required to be "seven Years a Citizen," U.S. CONST. art. I, § 2, cl. 2, and Senators "nine Years a Citizen," U.S. CONST.

art. I, § 3, cl. 3, because of concern over foreign intrigue.

The Constitution's eligibility requirements for President are even more stringent, reflecting the Framers' concern that this office was particularly susceptible to corruption. James Madison thought that because the Presidency "was to be administered by a single man . . . corruption was more within the compass of probable events." 2 FARRAND'S RECORDS 66. Building on this concern, the Constitution requires that the President be "a natural born Citizen," and have "been fourteen Years a Resident within the United States." U.S. CONST. art. II, § 1, cl. 5.

For all of the provisions described above, the Framers went beyond merely prohibiting bribery and treason, and instead created rules designed to prevent even the appearance of corruption or the loss of independence that could potentially arise from foreign gifts, a plum administrative position, or a foreign-born President. Even without any direct evidence of corruption in the fledgling national government, the Framers determined that these broad prophylactic measures were sufficiently important to include in our Nation's charter.

C. The Constitution's Structure Was Designed To Erect "Every Practicable Obstacle" Against Corruption.

While the structure of American constitutional democracy was obviously inspired by

more than just anti-corruption ideals, many of the central features of our republican government were, in fact, significant anti-corruption measures. These measures sought to ensure that the people's representatives remained as independent from corrupting forces as possible—"dependent on the people alone." THE FEDERALIST No. 52, at 294 (Madison).

For example, the Framers devised an innovative system of checks and balances to prevent the appearance and reality of corruption as well as to establish separation of powers and enhance policy outcomes. *See generally* THE FEDERALIST No. 51 (explaining the need for checks and balances) (Madison). Responding to the fear that it would be possible to "purchase the guardians of the people," James Madison explained that "[t]he improbability of such a mercenary and perfidious combination of the several members of government, standing on as different foundations as republican principles will well admit, and at the same time accountable to the society over which they are placed, ought alone to quiet this apprehension." THE FEDERALIST No. 55, at 313. The delegates' belief that multiple, overlapping structures were necessary to cabin possible corruption was particularly evident in their discussion of the veto power,[3] the treaty power,[4] and the appointment power.[5]

---

[3] James Madison believed that the power of the veto would allow the President to check "the Great & the wealthy who in the course of things will necessarily compose []the Legislative body." 2 FARRAND'S RECORDS 52. But even as the veto could serve as a check against corruption in coordinate branches,

Elections were also a central part of the Framers' anti-corruption constitutional design. Drawing on the experience of England, where "the

---

the delegates understood that a legislative override was also necessary to keep the veto power from itself becoming a tool of corruption. The delegates thus reduced the number of Senators needed to override a veto from three-quarters to two-thirds, for "[i]f ¾ be required, a few Senators having hopes from the nomination of the President to offices, will combine with him and impede proper laws." *Id.* at 586 (Gerry).

[4] The Constitution provides that the President "shall have Power . . . to make Treaties," but limits this power by requiring that the President obtain "the Advice and Consent of the Senate." U.S. CONST. art. II, § 2, cl. 2. Even with this check in place, the delegates recognized "the danger of putting the essential rights of the Union in the hands of so small a number as a majority of the Senate, representing perhaps, not one fifth of the people." 2 FARRAND'S RECORDS 548 (Gerry). Fearing that "[t]he Senate will be corrupted by foreign influence," *id.*, the delegates increased the ratification threshold from a simple majority to "two thirds of the Senators present." U.S. CONST. art. II, § 2, cl. 2.

[5] The Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" certain executive officials and members of the federal judiciary. U.S. Const. art. II, § 2, cl. 2. The Framers gave the appointment power to the President because, in part, they believed that he would "have *fewer* personal attachments to gratify than a body of men who may each be supposed to have an equal number; and will be so much the less liable to be misled by the sentiments of friendship and of affection." THE FEDERALIST NO. 76, at 424 (Hamilton). But they also gave to the Senate the power to give its "Advice and Consent" as a "check upon a spirit of favoritism in the President," one that "would tend greatly to prevent the appointment of unfit characters from," among other things, "family connection" or "personal attachment." *Id.* at 425.

electors [we]re so corrupted by the representatives, and the representatives so corrupted by the Crown," THE FEDERALIST No. 41, at 227-28 (Madison), the Framers wanted to avoid financial dependency of one branch of government upon another and make certain both branches were dependent on the people alone. *See* Teachout, 94 CORNELL L. REV. at 362-63. To achieve that goal, Article I, § 2 provides that "the House of Representatives shall be composed of Members chosen every second Year by the People of the several States," a provision Madison called the "fundamental article of republican government." THE FEDERALIST NO. 52, at 294.

Thus, as Madison explained, the House would have "an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured." *Id.* at 295. The Framers ensured that Congress would be "dependent on the people alone," *id.* at 294, by providing for elections "FREELY by the WHOLE BODY of the people every SECOND YEAR." THE FEDERALIST NO. 41, at 228 (Madison); *see* THE FEDERALIST No. 57, at 319 ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.") (Madison).

To give effect to these fundamental principles, the Framers gave to Congress the power to regulate the "Times, Places, and Manner of holding Elections" for Congress, U.S. Const. art. I, § 4, cl. 1, a broad, comprehensive power over all the mechanics of federal elections. *See Inter Tribal Council*, 133 S. Ct. at 2253-54. The Framers granted to Congress the power to establish uniform ground rules for federal elections "to prevent corruption or undue influence," 2 DEBATES IN THE SEVERAL STATE CONVENTIONS 535 (M'Kean), and to ensure that Congress would be dependent on the people alone, not factions in the states that might seek to "mould their regulations as to favor the candidates they wished to succeed." 2 FARRAND'S RECORDS 241 (Madison); *see* 3 DEBATES IN THE SEVERAL STATE CONVENTIONS 11 (observing that "the power of Congress to make the times of elections uniform in all the states, will destroy of the continuance of any cabal") (Nicholas). The Elections Clause gave Congress the power to guarantee the integrity of federal elections and prevent new forms of corruption from undermining the Constitution's promise that the government would be "'dependent on the people alone.'" *Inter Tribal*, 133 S. Ct. at 2258 (quoting THE FEDERALIST NO. 52).

Finally, the Framers' decision to select the President through the Electoral College was expressly intended to limit "the danger of cabal and corruption." 2 FARRAND'S RECORDS 500 (Mason). Alexander Hamilton explained that if the President were "appointed by the Legislature" the executive "would be tempted to make use of corrupt influence

to be continued in office." *Id.* at 524; *see* 2 FARRAND'S RECORDS 31, 404 (Morris). Hamilton later added that "the executive should be independent for his continuance in office on all but the people themselves," otherwise he might "be tempted to sacrifice his duty to his complaisance for those whose favor was necessary to" obtain reelection. THE FEDERALIST No. 68, at 412. The delegates' solution was to select the President though the Electoral College, which, James Wilson explained, was "as nearly home to the people as is practicable." 2 DEBATES IN THE SEVERAL STATE CONVENTIONS 512.

The Framers debated and rejected a proposal that would have permitted the Senate to break a deadlock in the Electoral College, concluding that "[r]eferring the appointment to the Senate lays a certain foundation for corruption & aristocracy," by establishing a "change in the mode of appointing the President which makes him dependent on the Senate." 2 FARRAND'S RECORDS 512, 524 (Williamson). James Wilson urged defeat of the proposal, observing that because of his "dependence on them," "the President will not be the man of the people as he ought to be, but the Minion of the Senate." *Id.* at 522, 523. This dependency on the Senate, rather than the people, would corrupt the Presidency. *See* Zachary S. Brugman, *The Bipartisan Promise of 1776: The Republican Form and its Manner of Election* 33 (2012) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2192705) (discussing the "many Framing fears that the President's dependence on the Senate for election would result in corruption"). Thus, as

Hamilton observed, the Framers refused to make "the appointment of the President to depend on any preexisting bodies of men who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment." THE FEDERALIST NO. 68, at 381.

In sum, the Framers of the Constitution created a constitutional system that reflects a broad interest in combating actual and apparent political corruption. The anti-corruption principle at the Constitution's core bolsters the government's argument that Congress' reasonable aggregate contribution limits are justified by the government's need to prevent real and apparent corruption of the political process. *See* FEC Br. at 31-42, 51-55.

II. CONSTITUTIONAL AMENDMENTS HAVE EXPANDED PROTECTION AGAINST CORRUPTION.

Just as the federal government has attempted to create new political safeguards against ever-evolving threats to the integrity of elections and government through regulation and legislation, *see* FEC Br. at 2-9, generations of Americans have added to the Framers' original constitutional protections against corruption through the amendment process.

First Amendment. The most obvious example of an anti-corruption amendment is the

First Amendment, which shields the voice of the people and the pen of the press from government censorship, allowing for healthy criticism and transparency in politics. In adding the Amendment to the Constitution, the Framers were mindful of the "special structural role of freedom of speech in a representative democracy." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 25 (1998). "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931). To make sure that Congress was dependent on the people, the First Amendment not only protects "freedom of speech, or of the press" but also guarantees "the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. Accordingly, while the First Amendment protects individual rights, it also serves as a bulwark against corruption and self-dealing incumbents.

Given the First Amendment's historic role in enabling Americans to stand up to corrupt and wrongheaded officials and policies, it is important that Congress' regulation of campaign contributions not encroach upon the anti-corruption principles of the First Amendment. Significantly, the federal law at issue here places no limits on the amount of money individuals can spend on campaign advocacy and only modest limits on the amount individuals may give to candidates, parties,

and political action committees, allowing an individual to contribute a total of $123,200 in each two year-election cycle. FEC Br. at 9, 21-23. It does not "deprive" anyone "of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Citizens United*, 558 U.S. at 340-41. It does not erect a "ban on speech," nor does it "repress speech by silencing certain voices." *Id.* at 339. On the contrary, the generous limits here ensure the kind of robust electoral debate the Framers viewed as critical, while also striking out at the kind of dependence corruption the Framers wrote the Constitution to prevent. *See Buckley*, 424 U.S. at 28-29.

Seventeenth Amendment. At the Founding, state legislatures were vested with the power to choose Senators for the people. U.S. Const. art. I, § 3. Because of this fact, as well as the body's smaller size and less frequent elections, there was concern at the Convention that "the Senate will be more likely to be corrupt than the H. of Reps." 2 FARRAND'S RECORDS 279 (Randolph). Indeed, the Framers insisted that revenue bills originate in the House because the Senate "should . . . have less to do with money matters." *Id.* In the event of corruption in the Senate, the Framers depended on "the House of Representatives, with the people on their side, . . . to bring back the Constitution to its primitive form and principles." THE FEDERALIST NO. 63, at 358 (Madison).

More than a century later, in adding the Seventeenth Amendment to the Constitution, the American people decreed a structural change was

necessary: the Senate, too, must be dependent on the people alone. This change reflected the American people's concern that the Senate had been corrupted by its dependence on state legislatures. The Seventeenth Amendment was ratified in 1913 following a number of public corruption scandals in the Senate that shook the confidence of the Nation. In perhaps the most infamous case, Senator William A. Clark of Montana confessed to making a "personal disbursement" of more than $140,000 to Montana state legislators. He was forced to resign his seat in 1899 after a unanimous Senate committee report called for his expulsion. Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, The Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 707 (1999). Senator William Lorimer of Illinois was actually expelled by the Senate in 1912 after reports that four state legislators had been bribed to change their vote on his behalf. *Id.* Between 1866 and 1900, there were nine Senate investigations of alleged bribery in Senate elections. *Id.* During the 58th Congress (1903-05), fully ten percent of the Senate was either on trial or subjected to legislative investigation. *Id.*

In the wake of these appalling instances of corruption, many believed that a structural change was necessary. In 1911, in response to these scandals, Senator Joseph Bristow of Kansas proposed an amendment to the Constitution requiring that Senators be "elected by the people."[6]

---

[6] Sen. Joseph Bristow, *The Direct Election of Senators*, *in* CONGRESSIONAL SERIAL SET ISSUE 6177 (U.S. G.P.O. 1912).

His focus was reining in the corruption of the Senate by corporate interests:

> With the development during recent times of the great corporate interests of the country, and the increased importance of legislation relating to their affairs, they have tenaciously sought to control the election of Senators friendly to their interests. The power of these great financial and industrial institutions can be very effectively used in the election of Senators by legislatures, and they have many times during recent years used that power in a most reprehensible and scandalous manner. They have spent enormous amounts of money in corrupting legislatures to elect to the Senate men of their own choosing.[7]

The concerns of the Framers of the Seventeenth Amendment over corruption and improper dependence on the states were similar to many of the concerns held by the delegates at the Constitutional Convention. *See, e.g.*, 1 FARRAND'S RECORDS 140 ("If the national legislature are appointed by the state legislatures, demagogues and corrupt members will creep in.") (Gerry).

Twenty-seventh Amendment. The Twenty-seventh Amendment, which prohibits any law varying the compensation of members of Congress

---

[7] *Id.*

from taking effect "until an election of representatives shall have intervened," U.S. CONST. amend. XXVII, began its constitutional journey as the Second Amendment proposed by the First Congress. AMAR, BILL OF RIGHTS, at 17-19. The proposal was designed "to limit the ability of Congressmen to line their own pockets at public expense." *Id.* at 18. While the measure failed to garner enough state support in the 1790s when it was first introduced, it was ratified in 1992 as the Twenty-seventh Amendment—another example of constitutional design seeking to restrain government self-dealing and corruption.

These three Amendments demonstrate that a broad government interest in combating actual and apparent corruption is a thread that runs through American democracy from the Founding to the present.

III. COURT PRECEDENT REFLECTS THE FRAMERS' UNDERSTANDING THAT THE GOVERNMENT HAS BROAD AUTHORITY TO COMBAT CORRUPTION.

Consistent with the constitutional text, history, and structure discussed above, this Court has long recognized the compelling nature of the government's interest in preventing both corruption and the appearance of corruption. Over a century ago, the Court observed that "[i]n a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by

popular elections, the temptations to control these elections . . . by corruption is a constant source of danger." *Ex Parte Yarbrough*, 110 U.S. 651, 666 (1884).

This Court has repeatedly "sustained limits on direct contributions in order to ensure against the reality or appearance of corruption." *Citizens United*, 558 U.S. at 357. Consistent with the Constitution's text and history, this Court has recognized that government may regulate campaign contributions in order to reduce opportunities for corruption and prevent candidates and officeholders from becoming dependent on high dollar donors. As *Citizens United* recognized, even though "few if any contributions to candidates will involve *quid pro quo* arrangements," regulation of campaign contributions is "preventative," *id.*, ensuring that candidates are not influenced to act "by the prospect of financial gain to themselves or infusions of money into their campaigns." *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 497 (1985). The essential point is that even where "actual corrupt contribution practices ha[ve] not been proved, Congress ha[s] an interest in regulating the appearance of corruption that is 'inherent in a regime of large individual financial contributions.'" *McConnell*, 540 U.S. at 298 (Kennedy, J., concurring in part and dissenting in part) (quoting *Buckley*, 424 U.S. at 27). Indeed, the Constitution itself contains a number of similar prophylactic protections to ensure a government "dependent on the people alone." THE FEDERALIST NO. 52, at 294 (Madison).

Consistent with these anti-corruption first principles, this Court in *Buckley* held that the First Amendment permits the federal government to limit the size and aggregate amount of contributions in federal elections. The Court held that Congress was "surely entitled to conclude" that "contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors and the amounts of their contributions are fully disclosed." *Buckley*, 424 U.S. at 28. The *Buckley* Court held that the aggregate contribution limits were necessary to make the basic scheme of contribution limits effective, describing them as "no more than a corollary of the basic individual contribution limitation that we have found constitutionally valid." *Id.* at 38.

Given the overriding constitutionally-based interest in ensuring a system of federal elections free from corrupting influences and dependencies, Congress did not have to permit an individual to make an unlimited number of campaign contributions, but could impose a "quite modest restraint" on total aggregate contributions "to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Id.*

The aggregate contribution limitations challenged by McCutcheon, which are simply an updated version of the $25,000 limit upheld in *Buckley*, are plainly constitutional efforts to prevent corruption. The aggregate limits continue to serve a critical role in Congress' effort to regulate large campaign contributions to "deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Buckley*, 424 U.S. at 28. Congress properly concluded that aggregate limits play a necessary role in securing a Congress free from corrupting dependence on high-dollar donors. That judgment is strongly supported by the Constitution's text and history, which recognized such improper dependence as a root form of corruption.

McCutcheon argues that the aggregate limits are no longer necessary in light of recent changes to the federal campaign finance laws, *see* McCutcheon Br. at 34-48, but these arguments blinker reality. As the district court noted, if the aggregate limits did not exist, "an individual might, for example, give half-a-million dollars in a single check to a joint fundraising committee comprising a party's presidential candidate, the party's national party committee, and most of the party's state party committees." *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 140 (C.D.D.C. 2012); *see id.* at 135-36 ("[A]n individual might contribute $3.5 million to one party and its affiliated committees in a single election cycle."). Without aggregate limits, huge hard money contributions of the sort federal campaign finance laws were designed to prevent

would likely return. The result would be increased dependence on an even tinier group of donors willing to bankroll campaigns. McCutcheon's argument turns the Constitution, which was designed to prevent such improper dependence, on its head.

Under *Buckley*, "the inquiry turns on whether the Legislature has established that the regulated conduct has inherent corruption potential, thus justifying the inference that regulating the conduct will stem the appearance of real corruption." *McConnell*, 540 U.S. at 297-98 (Kennedy, J., concurring in part and dissenting in part). Here it has. Congress enacted aggregate contribution limits to "curtail the influence of excessive political contributions by any single person," 120 Cong. Rec. 27,224 (1974), finding "multiple instances in which contributions to numerous separate entities had been made at the request of a particular candidate." FEC Br. at 4. Absent these limits, individuals could, as they did before the passage of the contributions limits upheld in *Buckley*, "contribute massive amounts to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Buckley*, 424 U.S. at 38; *see* FEC Br. at 35-43.

Aggregate contribution limits thus continue to serve the essential function of ensuring the integrity of federal elections. By limiting the ability of individuals to make massive political contributions to candidates and political parties,

aggregate contribution limits check both actual and apparent corruption "stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions," *Buckley*, 424 U.S. at 27, and prevent an unhealthy dependence on high-dollar donors. In this respect, aggregate limits help ensure a system of financing federal elections dependent on "the great body of the people" and "not [on] an inconsiderable proportion or a favored class of it," THE FEDERALIST NO. 39, at 209 (Madison).

* * *

Anti-corruption principles are a core element of the Constitution's text, history, and structure, with overlapping constitutional provisions designed to serve as a bulwark against insidious corruption. These principles translate into a strong governmental interest in combating real and apparent corruption in politics and government — including the corruption of individuals, vis-à-vis quid pro quo corruption, and the corruption of institutions, vis-à-vis improper dependence. Consistent with the anti-corruption principles that shaped the design of the Constitution, the Court should uphold the power of the federal government to establish aggregate limits on campaign contributions to combat corruption.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

Douglas T. Kendall
Elizabeth B. Wydra*
*Counsel of Record
David H. Gans
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street, NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

July 2013

APPENDIX

APPENDIX

Catalogue of Use of "Corruption" In Founding Constitutional Debates[1]

This appendix catalogues the instances in which the word "corruption" was used in debates about the creation and ratification of the Constitution, grouped by type of corruption referenced. It is a companion to an online, interactive database, located at http://ocorruption.tumblr.com, which contains the full quotes as well as links to the original source so that the quote may be viewed in context. This appendix also explains the methodology and sources used to create the catalogue and database, and summarizes the results.

Sources

- The Library of Congress online archives of Max Farrand's *The Records of the Federal Convention of 1787*[2] and Jonathan Elliot's *The Debates in the Several State Convention on the Adoption of the Federal Constitution*[3].
- ConSource's[4] online version of *The Federalist Papers*[5], together with their archives of Anti-

---

[1] This appendix and the online database were compiled with the research assistance of Dennis Courtney and Zach D'Amico.

[2] http://memory.loc.gov/ammem/amlaw/lwfr.html. All URLs in this document refer to the versions accessed on July 1, 2013.

[3] http://memory.loc.gov/ammem/amlaw/lwed.html

[4] http://www.consource.org/

Federalist and Pro-Federalist writings[6], and records of the state ratification debates[7].

- Letters, newspaper articles, and other printed matter from the "Commentaries on the Constitution" section[8] of the digital edition of the Documentary History of the Ratification of the Constitution[9].

Methodology

Each source was searched for all uses of variants of the word "corrupt" (e.g. "corruption," "corrupted," etc.). Each usage was read in context and categorized as either referring primarily to corruption of an *individual*, or to corruption of an *entity*[10]. Repeated uses within the same discussion were counted and categorized only once, unless the sense of usage

---

5 http://consource.org/library/?type=document&topics=&collections=the-federalist-papers&deep=&sort=date

6 http://consource.org/library/?type=document&topics=&collections=anti-federalist-and-pro-federalist-papers&deep=&sort=date

7 http://consource.org/library/?type=document&topics=&collections=state-ratification-debates&deep=&sort=date

8 http://rotunda.upress.virginia.edu/founders/default.xqy?keys=RNCN-print-03&mode=TOC

9 http://rotunda.upress.virginia.edu/founders/RNCN.html

10 Two classes of references were excluded from the collection: uses of the term in statutory language specific to attainder ("corruption of blood"), and descriptions of moral decline unrelated to any government function (e.g. general "corruption of public morals").

changed. Each usage was reviewed separately by two parties, and in the case of difficult or ambiguous entries, the two worked, through discussion and further research, to establish a classification.

Uses of "corruption" were also flagged if they located corruption in an "improper dependence" of one thing on another, either explicitly or implicitly, or if a "quid pro quo" exchange was clearly implicated. Although these themes are suggested in many quotations, tags were not applied unless they were unambiguously present.

Summary statistics

Of 325 recorded usages, 56% (183) referred to corruption of an entity, while 44% (142) spoke of corruption of an individual. There were 5 mentions of "quid pro quo" corruption, and 29 mentions of "improper dependence" corruption. All "quid pro quo" usages referred to individual corruption. On the other hand, only 9 of 29 (31%) references to "improper dependence" corruption located that corruption in an individual, with 20 of those 29 (69%) references speaking of corruption of an entity.

If one classifies references by the branch of government that is hosting the corruption, most usages discuss corruption of the legislative branch. Of these, about half, but fewer than half, refer to "individual" corruption.

Instances of "Corruption" Usage, Grouped By Type of Corruption Referenced, Date, and Speaker

Entity Corruption

02/27/1783 James Madison

04/20/1787 John Adams

05/28/1787 Charles Pinckney

05/28/1787 Charles Pinckney

06/01/1787 James Wilson (notes of Rufus King)

06/06/1787 Alexander Hamilton

06/07/1787 John Dickinson (notes of Rufus King)

06/09/1787 Elbridge Gerry (notes of James Madison)

06/16/1787 James Wilson (notes of James Madison)

06/18/1787 Alexander Hamilton (notes of Rufus King)

06/18/1787 Alexander Hamilton (notes of James Madison)

06/18/1787 Alexander Hamilton (notes of James Madison)

06/19/1787 James Madison (notes of Robert Yates)

06/20/1787 John Lansing (notes of James Madison)

06/22/1787 George Mason (notes of Robert Yates)

Entity Corruption (continued)

06/22/1787 Nathaniel Gorham (notes of Robert Yates)

06/22/1787 Alexander Hamilton (notes of Robert Yates)

06/22/1787 Pierce Butler (notes of Robert Yates)

06/23/1787 James Wilson (notes of James Madison)

06/23/1787 George Mason (notes of James Madison)

06/23/1787 John Rutledge (notes of James Madison)

06/23/1787 Pierce Butler (notes of John Lansing)

06/26/1787 Letter in the Philadephia Independent Gazetteer

06/28/1787 James Madison

07/06/1787 John Dickinson (notes of James Madison)

07/10/1787 Elbridge Gerry (notes of James Madison)

07/17/1787 Gouverneur Morris

07/17/1787 James Wilson

07/17/1787 George Mason

07/19/1787 Edmund Randolph (notes of James Madison)

07/25/1787 James Madison

08/07/1787 James Madison (notes of Rufus King)

08/08/1787 Nathaniel Gorham (notes of James Madison)

08/13/1787 Elbridge Gerry

Entity Corruption (continued)

08/13/1787 Edmund Randolph (notes of James Madison)

08/14/1787 John Mercer (notes of James Madison)

08/14/1787 Gouverneur Morris (notes of James Madison)

08/14/1787 Edmund Randolph (notes of James Madison)

08/14/1787 Hugh Williamson (notes of James Madison)

08/14/1787 George Mason

08/17/1787 Elbridge Gerry (notes of James Madison)

08/23/1787 Edmund Randolph

08/24/1787 Gouverneur Morris (notes of James Madison)

08/24/1787 Roger Sherman (notes of James Madison)

08/29/1787 James Madison

09/04/1787 Gouverneur Morris (notes of James Madison)

09/04/1787 James Wilson (notes of James Madison)

09/04/1787 George Mason (notes of James Madison)

09/05/1787 Hugh Williamson (notes of James Madison)

09/07/1787 James Madison

Entity Corruption (continued)

09/08/1787 Gouverneur Morris (notes of James Madison)

09/08/1787 Alexander Hamilton (notes of James Madison)

09/08/1787 Elbridge Gerry (notes of James Madison)

09/12/1787 George Mason

09/17/1787 Benjamin Franklin (notes of James Madison)

09/28/1787 Tench Coxe

09/29/1787 Curtius

10/05/1787 Centinel I

10/10/1787 Federal Farmer III

10/17/1787 Caesar II

10/18/1787 Pelatiah Webster

10/20/1787 Louis Guillaume Otto

10/24/1787 Centinel II

10/25/1787 Newport Herald

11/02/1787 Alexander Hamilton

11/08/1787 Pelatiah Webster

11/15/1787 Cincinnatus III - to James Wilson, Esquire

11/20/1787 George Staunton (via Thomas Lee Shippen)

Entity Corruption (continued)

11/21/1787 Alexander Hamilton

11/22/1787 James Madison

11/28/1787 Federal Republican - Review of the Constitution

11/29/1787 Luther Martin

11/29/1787 James McHenry

12/04/1787 John Smilie (notes of Anthony Wayne)

12/04/1787 James Wilson (notes of Thomas Lloyd)

12/05/1787 William Findley (notes of James Wilson)

12/06/1787 John Smilie

12/07/1787 James Madison

12/11/1787 James Wilson (notes of Thomas Lloyd)

12/11/1787 James Wilson (notes of Thomas Lloyd)

12/12/1787 Benjamin Rush (in newspaper report)

12/14/1787 Alexander Hamilton

12/14/1787 Alexander Hamilton

12/18/1787 Minority dissent of the Pennsylvania Convention

12/20/1787 Thomas Jefferson

12/24/1787 Timothy Pickering

12/31/1787 Thomas Jefferson

12/31/1787 Isaac Stearns

01/09/1788 John Brown Cutting

Entity Corruption (continued)

01/16/1788 John Taylor (notes of Theophilius Parson)

01/16/1788 Charles Pinckney

01/16/1788 Charles Pinckney

01/18/1788 James Madison

01/19/1788 James Madison

01/21/1788 John Taylor (notes of Theophilius Parson)

01/23/1788 James Madison

02/04/1788 Thomas Thacher

02/13/1788 James Madison

02/19/1788 James Madison

02/26/1788 John Trumbull

02/27/1788 James Madison

02/27/1788 Marcus II Norfolk and Portsmouth Journal

03/01/1788 James Madison

03/01/1788 James Madison

03/01/1788 James Madison

03/01/1788 James Madison

03/05/1788 John Jay

03/05/1788 John Jay

03/07/1788 Alexander Hamilton

03/08/1788 Alexander Hamilton

Entity Corruption (continued)

03/08/1788 Alexander Hamilton

03/12/1788 Alexander Hamilton

03/12/1788 Alexander Hamilton

03/21/1788 Alexander Hamilton

03/29/1788 James Freeman to Theophilus Lindsey

04/01/1788 Alexander Hamilton

04/16/1788 A Farmer

04/30/1788 Address to New York, Virginia Conventions

05/02/1788 Federal Farmer - Letters to the Republican

05/02/1788 Federal Farmer - Letters to the Republican

05/02/1788 Federal Farmer - Letters to the Republican

05/02/1788 Federal Farmer - Letters to the Republican

05/02/1788 Federal Farmer - Letters to the Republican

05/02/1788 Federal Farmer - Letters to the Republican

05/02/1788 Federal Farmer - Letters to the Republican

05/05/1788 Pierce Butler

Entity Corruption (continued)

05/10/1788 Nathan Dane

06/03/1788 George Nicholas

06/05/1788 James Madison

06/05/1788 Richard Lee

06/07/1788 Edmund Randolph

06/07/1788 Edmund Randolph

06/07/1788 Edmund Randolph

06/10/1788 Edmund Randolph

06/11/1788 William Grayson

06/11/1788 William Grayson

06/11/1788 George Mason

06/11/1788 George Mason

06/11/1788 George Mason

06/11/1788 William Grayson

06/12/1788 Patrick Henry

06/13/1788 William Grayson

06/13/1788 John Tyler

06/14/1788 Edmund Pendleton

06/17/1788 Edmund Randolph

06/21/1788 Alexander Hamilton (notes of John McKesson)

06/21/1788 Melancton Smith (notes of John McKesson)

Entity Corruption (continued)

06/21/1788 Alexander Hamilton (notes of John McKesson)

06/21/1788 Melancton Smith (notes of John McKesson)

06/21/1788 Alexander Hamilton (notes of John McKesson)

06/23/1788 John Jay (notes of John McKesson)

06/23/1788 Robert Livingston (notes of John McKesson)

06/24/1788 Richard Harison (notes of John McKesson)

06/24/1788 John Lansing (notes of Francis Childs)

06/24/1788 Edmund Randolph

06/24/1788 Robert Livingston (notes of John McKesson)

06/24/1788 Gilbert Livingston (notes of John McKesson)

06/25/1788 George Clinton (notes of John McKesson)

06/25/1788 James Innes

06/27/1788 Melancton Smith (notes of John McKesson)

06/27/1788 Robert Livingston (notes of John McKesson)

06/30/1788 Samuel Jones (notes of John McKesson)

Entity Corruption (continued)

07/01/1788 Timothy Bloodworth

07/02/1788 Gilbert Livingston (notes of John McKesson)

07/02/1788 Alexander Hamilton (notes of John McKesson)

07/03/1788 Nathan Dane

07/05/1788 Samuel Jones (notes of Richard Harison)

07/07/1788 Samuel Jones (notes of Richard Harison)

07/25/1788 William Davie

07/26/1788 William Davie

07/30/1788 William Lenoir

06/01/1789 Brutus III

06/08/1789 Brutus IV

06/08/1789 Brutus IV

07/16/1789 Henry Gibbs

08/19/1789 James Madison

01/18/1798 Albert Gallatin

01/23/1798 William Findley

12/24/1799 James Madison

01/23/1800 Abraham Baldwin

12/25/1802 Gouverneur Morris

02/24/1815 Gouverneur Morris

03/20/1816 Rufus King

Individual Corruption

10/02/1778 George Mason

05/23/1783 Daniel Carroll

05/30/1783 George Mason

06/04/1787 Pierce Butler (notes of Rufus King)

06/06/1787 Elbridge Gerry (notes of Yates and King)

06/06/1787 James Madison

06/18/1787 Alexander Hamilton (notes of James Madison)

06/23/1787 George Mason (notes of Robert Yates)

07/18/1787 James Madison

07/19/1787 Gouverneur Morris (notes of James Madison)

07/19/1787 Hugh Williamson (notes of James Madison)

07/20/1787 George Mason (notes of James Madison)

07/20/1787 Gouverneur Morris (notes of James Madison)

07/20/1787 Gouverneur Morris (notes of James Madison)

07/20/1787 James Madison

08/08/1787 George Mason (notes of James Madison)

08/09/1787 James Wilson (notes of James McHenry)

08/23/1787 Nathaniel Gorham

09/03/1787 George Mason (notes of James Madison)

Individual Corruption (continued)

09/06/1787 Alexander Hamilton

09/07/1787 Pierce Butler (notes of James Madison)

09/12/1787 Elbridge Gerry (notes of James Madison)

09/12/1787 Pennsylvania Gazette

10/17/1787 A Democratic Federalist

10/18/1787 A Citizen of Philadelphia Remarks

11/01/1787 An Old Whig V

11/02/1787 Alexander Hamilton

11/20/1787 Thomas Lee Shippen

11/22/1787 James Madison

11/28/1787 Federal Republican Review of the Constitution

11/29/1787 James McHenry

11/29/1787 Luther Martin

11/29/1787 Luther Martin

12/03/1787 A Landholder V

12/03/1787 John Smilie (notes of James Wilson)

12/04/1787 James Wilson (notes of Thomas Lloyd)

12/04/1787 James Wilson (notes of Thomas Lloyd)

12/10/1787 Thomas McKean (notes of Thomas Lloyd)

12/11/1787 James Wilson (notes of Thomas Lloyd)

12/14/1787 Alexander Hamilton

Individual Corruption (continued)

12/14/1787 Alexander Hamilton

12/14/1787 Alexander Hamilton

12/18/1787 Minority dissent of the Pennsylvania Convention

12/24/1787 Poplicola - Boston Gazette

01/05/1788 Samuel Osgood

01/09/1788 Tamony - Virginia Independent Chronicle

01/12/1788 James Madison

01/16/1788 Charles Pinckney

01/16/1788 John Rutledge

01/21/1788 Boston Gazette and the Country Journal

01/21/1788 Martin Kingsley (notes of Theophilus Parson)

01/23/1788 Philadelphiensis VIII

01/31/1788 Aristides - Remarks on the Proposed Plan

01/31/1788 Aristides - Remarks on the Proposed Plan

01/31/1788 Aristides - Remarks on the Proposed Plan

02/02/1788 Mercy Warren

02/06/1788 Samuel Stillman

02/13/1788 James Madison

02/13/1788 James Madison

02/20/1788 Marcus I - Norfolk and Portsmouth Journal

Individual Corruption (continued)

02/26/1788 Centinel XVI

03/08/1788 Alexander Hamilton

03/08/1788 Alexander Hamilton

03/12/1788 Alexander Hamilton

03/18/1788 Alexander Hamilton

03/19/1788 Alexander Hamilton

03/20/1788 Brutus XV

03/21/1788 Alexander Hamilton

03/26/1788 Alexander Hamilton

04/01/1788 Alexander Hamilton

04/15/1788 John Dickinson

04/28/1788 George Washington

05/01/1788 Address of minority of Maryland Convention

05/02/1788 Federal Farmer - Letters to the Republican

05/02/1788 Federal Farmer - Letters to the Republican

05/02/1788 Federal Farmer - Letters to the Republican

05/02/1788 Federal Farmer - Letters to the Republican

05/02/1788 Federal Farmer - Letters to the Republican

Individual Corruption (continued)

05/02/1788 Federal Farmer - Letters to the Republican

05/02/1788 Federal Farmer - Letters to the Republican

06/05/1788 Patrick Henry

06/07/1788 Edmund Randolph

06/07/1788 Patrick Henry

06/07/1788 Francis Corvin

06/09/1788 Patrick Henry

06/09/1788 Patrick Henry

06/10/1788 John Marshall

06/10/1788 James Monroe

06/10/1788 James Monroe

06/11/1788 George Mason

06/11/1788 James Madison

06/12/1788 William Grayson

06/12/1788 Patrick Henry

06/13/1788 George Mason

06/13/1788 Edmund Randolph

06/13/1788 Patrick Henry

06/13/1788 Patrick Henry

06/13/1788 William Grayson

06/14/1788 Patrick Henry

Individual Corruption (continued)

06/17/1788 Edmund Randolph

06/17/1788 Edmund Randolph

06/18/1788 James Monroe

06/18/1788 James Monroe

06/20/1788 Melancton Smith (notes of John McKesson)

06/21/1788 Melancton Smith (notes of John McKesson)

06/21/1788 William Grayson

06/21/1788 John Williams (notes of John McKesson)

06/23/1788 John Jay (notes of John McKesson)

06/23/1788 Robert Livingston (notes of John McKesson)

06/23/1788 Richard Harison (notes of John McKesson)

06/24/1788 John Lansing (notes of Francis Childs)

06/24/1788 Alexander Hamilton (notes of Francis Childs)

06/25/1788 Melancton Smith (notes of John McKesson)

06/25/1788 Robert Livingston (notes of John McKesson)

06/27/1788 Alexander Hamilton (notes of John McKesson)

Individual Corruption (continued)

07/02/1788 John Lansing (notes of John McKesson)

07/02/1788 Richard Harison (notes of John McKesson)

07/02/1788 John Lansing (notes of John McKesson)

07/02/1788 Alexander Hamilton (notes of John McKesson)

07/02/1788 George Clinton (notes of John McKesson)

07/03/1788 Nathan Dane

07/05/1788 Alexander Hamilton

07/05/1788 Alexander Hamilton

07/05/1788 Alexander Hamilton

07/05/1788 Alexander Hamilton

07/25/1788 James Iredell

07/28/1788 Timothy Bloodworth

07/28/1788 Samuel Spencer

07/28/1788 James Iredell

07/28/1788 James Iredell

07/28/1788 James Iredell

07/30/1788 William Lenoir

06/08/1789 Brutus IV

07/05/1789 Cato V

08/13/1789 Fisher Ames

08/19/1789 Roger Sherman

Individual Corruption (continued)

12/21/1798 James Madison

02/21/1805 Joseph Hopkinson

03/01/1821 William Smith

08/23/1823 James Madison

03/18/1824 Rufus King

11/17/1830 James Madison

Improper Dependence — Explicit

07/19/1787 Gouverneur Morris (notes of James Madison)

09/08/1787 Gouverneur Morris (notes of James Madison)

03/12/1788 Alexander Hamilton

Improper Dependence — Implicit

07/17/1787 Gouverneur Morris

07/20/1787 George Mason (notes of James Madison)

07/20/1787 Gouverneur Morris (notes of James Madison)

08/24/1787 Gouverneur Morris (notes of James Madison)

Improper Dependence — Implicit (continued)

09/04/1787 Gouverneur Morris (notes of James Madison)

09/29/1787 Curtius

10/05/1787 Centinel I

11/02/1787 Alexander Hamilton

11/22/1787 James Madison

11/29/1787 Luther Martin

12/04/1787 James Wilson (notes of Thomas Lloyd)

12/10/1787 Thomas McKean (notes of Thomas Lloyd)

12/11/1787 James Wilson (notes of Thomas Lloyd)

12/18/1787 Minority dissent of the Pennsylvania Convention

12/24/1787 Timothy Pickering

01/16/1788 Charles Pinckney

03/21/1788 Alexander Hamilton

04/28/1788 George Washington

06/05/1788 James Madison

06/24/1788 Richard Harison (notes of John McKesson)

07/26/1788 William Davie

07/28/1788 James Iredell

06/01/1789 Brutus III

06/08/1789 Brutus IV

Improper Dependence — Implicit (continued)

06/08/1789 Brutus IV

03/20/1816 Rufus King

Quid-Pro-Quo Corruption

08/08/1787 George Mason (notes of James Madison)

11/29/1787 Luther Martin

01/21/1788 Boston Gazette and the Country Journal

06/13/1788 George Mason

07/25/1788 James Iredell

AMICUS CURIAE BRIEF

AND
BRIEFS

No. 12-536

FILED
MAY 13 2013
OFFICE OF THE CLERK

In the Supreme Court of the United States

SHAUN McCUTCHEON, ET AL.,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF SENATOR MITCH MCCONNELL AS *AMICUS CURIAE* SUPPORTING APPELLANTS

Bobby R. Burchfield
Counsel of Record
Matthew M. Leland
Brandon H. Barnes
Michael S. Stanek
Andrea M. Alegrett
Mary D. Hallerman
McDERMOTT WILL & EMERY LLP
500 N. Capitol St., N.W.
Washington, D.C. 20001
(202) 756-8000
bburchfield@mwe.com

Counsel for Amicus Curiae

LIBRARY OF CONGRESS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. AS WITH POLITICAL EXPENDITURES, STRICT SCRUTINY MUST APPLY TO POLITICAL CONTRIBUTIONS 4

A. Political Contributions Are Central Elements of Core Political Speech and Association 6

B. Complaisant Review of Contribution Limits Is Unfounded and Illogical 9

C. Justices of This Court Have Repeatedly and Consistently Questioned the More Relaxed First Amendment Review of Contribution Limits 17

D. *Stare Decisis* Does Not Justify Adherence to the Unworkable and Ill-Advised Complaisant Review of Contribution Limits 20

E. Even If the Court Does Not Reconsider "Closely Drawn" Scrutiny for All Contribution Limits, Strict Scrutiny Is Appropriate for Aggregate Limits 21

II. THE AGGREGATE LIMIT ON INDIVIDUAL CONTRIBUTIONS TO CANDIDATES OFFENDS THE FIRST AMENDMENT 23

A. Section 441a(a)(3) Abridges the Rights of Speech and Association 23

B. No Justification for the Aggregate Limit on Contributions to Candidates Can Salvage It 24

III. AGGREGATE LIMITS ON INDIVIDUAL CONTRIBUTIONS TO NON-CANDIDATE POLITICAL COMMITTEES OFFEND THE FIRST AMENDMENT 32

A. The Aggregate Limit on Contributions to National Political Party Committees Is Not Closely Drawn To Serve Any Government Interest 33

B. The Aggregate Limit on Contributions to Other Political Committees Is Not Closely Drawn To Serve Any Government Interest 36

CONCLUSION 38

TABLE OF AUTHORITIES

CASES

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) 30

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Buckley v. Valeo, 519 F.2d 821 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976) 29

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) 20

Citizens United v. FEC, 558 U.S. 310 (2010) ..... *passim*

Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) 19

Davis v. FEC, 554 U.S. 724 (2008) 5, 30

FEC v. Beaumont, 539 U.S. 146 (2003) 3, 5, 19, 22

FEC v. Colo. Republican Federal Campaign Comm., 533 U.S. 431 (2001) 14, 15

FEC v. Nat'l Conservative Political Action Comm.,
470 U.S. 480 (1985) 13, 18, 21

Glidden Co. v. Zdanok,
370 U.S. 530 (1962) 20

Green Party of Connecticut v. Garfield,
616 F.3d 189 (2d Cir. 2010) 23, 24

Lavin v. Husted,
689 F.3d 543 (6th Cir. 2012) 24

McConnell v. FEC,
540 U.S. 93 (2003) 1, 15, 19, 34

Montejo v. Louisiana,
556 U.S. 778 (2009) 20

Nixon v. Shrink Missouri Gov't PAC,
528 U.S. 377 (2000) 9, 14, 19

Payne v. Tennessee,
501 U.S. 808 (1991) 20

Randall v. Sorrell,
548 U.S. 230 (2006) 7, 16, 19

Texas v. Johnson,
491 U.S. 397 (1989) 11

Turner Broad. Sys. v. FCC,
512 U.S. 622 (1994) 28

United States v. Eichman,
496 U.S. 310 (1990) 11

Virginia v. Black,
538 U.S. 343 (2003) 11

CONSTITUTIONAL PROVISION

U.S. Const. amend. I ..... *passim*

STATUTES

2 U.S.C. § 431, *et seq.* 4, 5, 14, 34

2 U.S.C. § 431(8)(B)(i) 14

2 U.S.C. § 437g(d)(1)(A)(i) 23

2 U.S.C. § 441a(a)(1)(A) 29

2 U.S.C. § 441a(a)(1)(B) 25

2 U.S.C. § 441a(a)(1)(C) 33

2 U.S.C. § 441a(a)(1)(D) 25

2 U.S.C. § 441a(a)(2)(A) 29, 33

2 U.S.C. § 441a(a)(2)(B) 33

2 U.S.C. § 441a(a)(2)(C) 33, 34

2 U.S.C. § 441a(a)(3)(A) 23

2 U.S.C. § 441a(a)(3)(B) 32

2 U.S.C. § 441a(a)(4) 35

2 U.S.C. § 441a(a)(5)(B) 34

2 U.S.C. § 441a(a)(7) 25

2 U.S.C. § 441a(a)(7)(B)(i) 14

2 U.S.C. § 441a(a)(8) 25

2 U.S.C. § 441a(d)(1) 33

2 U.S.C. § 441a(d)(3) 33

2 U.S.C. § 441a(h) 33

2 U.S.C. § 441i(a)(1) 15

2 U.S.C. § 441i(b) 34

REGULATION

Treas. Reg. § 56.4911-5(f)(1)(i) 8

OTHER AUTHORITIES

2013-2014 aggregate contribution limits, *available at* http://www.fec.gov/info/contriblimitschart1314.pdf (last visited May 7, 2013) 2

Arizona Democratic Party, *Join the Arizona Democratic Council*, http://azdem.org/action/contribute/adc/levels/ (last visited May 7, 2013) 8

Center for Responsive Politics, *Emily's List: All Recipients*, http://www.opensecrets.org/orgs/recips.php?id=d000000113 (contributions to President Obama and 50 House and 13 Senate candidates) (last visited May 7, 2013) 37

Center for Responsive Politics, *2012 Overview Stats at a Glance*, http://www.opensecrets.org/overview/ (last visited May 7, 2013) 35

Center for Responsive Politics, *Priorities USA Action Independent Expenditures*, http://www.opensecrets.org/pacs/indexpend.php?strID=C00495861&cycle=2012 (last visited May 7, 2013) 26

Center for Responsive Politics, *Super PACs*, http://www.opensecrets.org/pacs/superpacs.php?cycle =2010 (last visited May 7, 2013) 26

Center for Responsive Politics, *Winning Our Future Independent Expenditures*, http://www.opensecrets.org/pacs/ indexpend.php?strID=C00490045&cycle=2012 (last visited May 7, 2013) 26

Center for Responsive Politics, *Winning Our Future Independent Expenditures*, http://www.opensecrets.org/pacs/ indexpend.php?strID=C00507525&cycle=2012 (last visited May 7, 2013) 27

120 Cong. Rec. 27 (1974) 30

147 Cong. Rec. 4585 (2001) 25, 30

The Cook Political Report, *2012 House Race Ratings for November 1, 2012*, http://cookpolitical.com/house/charts/ race-ratings/5084 (last visited May 7, 2013) 28

Federal Election Commission, *Candidate Committee Viewer*, http://www.fec.gov/finance/disclosure/candcmte_info.shtml 34

Federal Election Commission, *Query by Individual Contributor*, http://www.fec.gov/finance/disclosure/advindsea.shtml (search "Donald Trump," "Michael Bloomberg," and "Aaron Sorkin")(last visited May 7, 2013) 12

Georgia Democrats, *Georgia Democrats Yellow Dog Club*, http://www.georgiademocrat.org/contribute/yellow-dog-club/ (last visited May 7, 2013) 8

In the Matter of Democratic Senatorial Campaign Committee, et al., MUR No. 3620 (Aug. 16, 1995), http://www.fec.gov/disclosure_data/mur/3620.pdf 27

Federal Election Commission, *MUR 3620 (Democratic Senatorial Campaign Committee) – Request to Modify Conciliation Agreement*, Agenda Doc. No. 12-79 (Nov. 9, 2012), *available at* http://www.fec.gov/agenda/2012/mtgdoc_1279.pdf 28

Press Release, NARAL Pro-Choice America, *NARAL Pro-Choice America PAC Announces New Endorsements in Key House, Senate Contests To End War on Women* (April 3, 2012), *available at* http://www.prochoiceamerica.orgelections/elections-press-releases/2012/pr04032012_pac-endorsements.html (last visited May 7, 2013) 37

Republican Party of Arkansas, *Contribute—Business Counsel*, http://www.arkansasgop.org/index.cfm?p=business-council (last visited May 7, 2013) 8

David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum L. Rev. 1369 (1994) 7

INTEREST OF AMICUS CURIAE

Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky.[1] He is the Republican Leader in the United States Senate and the former Chairman of the National Republican Senatorial Committee, a national political party committee comprising the Republican members of the United States Senate.

Senator McConnell is a respected senior statesman and is recognized as the Senate's most passionate defender of the First Amendment guarantee of unrestricted political speech. He has acquired considerable experience over the last three decades complying with federal and state campaign finance restrictions and legislating on campaign finance issues. For many years, Senator McConnell has participated in litigation challenging restrictions on political speech. For example, he was the lead plaintiff challenging the Bipartisan Campaign Reform Act ("BCRA") in *McConnell v. FEC*, 540 U.S. 93 (2003), and participated as *amicus* both by brief and oral argument in *Citizens United v. FEC*, 558 U.S. 310 (2010), which overruled *McConnell v. FEC* in part. Senator McConnell submits this brief in support of Appellants.

---

[1] This brief is filed with the consent of all parties and pursuant to United States Supreme Court Rule 37.3(a). Pursuant to Rule 37.6, Senator McConnell states that no party or person other than Senator McConnell and his counsel participated in or contributed money for the drafting of this brief.

SUMMARY OF ARGUMENT

I. The Court should revisit the bifurcated standard of review for political contribution and expenditure limits and hold that strict scrutiny applies to both. The justifications set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), for the less rigorous standard of review for contribution limits have proved invalid, and case law shows that a principled distinction between contributions and expenditures is difficult to draw.

II. Should the Court nevertheless decide that "closely drawn" scrutiny should still apply to contribution limits, the aggregate limit on contributions by individuals to candidates cannot pass even that less rigorous standard. Once an individual contributes $48,600[2] over a two year period to federal candidates, the aggregate limit imposes a total ban on non-corrupting contributions from that individual to any other candidates. This total ban severely infringes the rights of association and speech. In view of restrictions on earmarked contributions, on the proliferation of affiliated political committees, and on the political party committees, the government cannot show a single instance in which a contributor has been able to channel excessive contributions through multiple candidate committees to a single candidate.

---

[2] The aggregate contribution limits referred to herein are the 2013-2014 aggregate contribution limits, *available at* http://www.fec.gov/info/contriblimitschart1314.pdf (last visited May 7, 2013).

III. The $74,600 aggregate limits on contributions by individuals to political committees, of which not more than $48,000 may go to committees which are not political parties, suffers from the same flaws as the aggregate limit on candidate contributions. It imposes a severe infringement on the rights of speech and association, but cannot be supported by even a single instance of successful evasion.

ARGUMENT

This case presents an opportunity for the Court to reject, based on almost four decades of experience, the less rigorous, "complaisant" level of First Amendment review accorded to contribution limits. *See FEC v. Beaumont*, 539 U.S. 146, 161 (2003). Since *Buckley*, the Court has employed a bifurcated standard to review campaign finance restrictions, applying strict scrutiny to political expenditure limits and never upholding them, while applying "closely drawn" scrutiny to political contribution limits and almost never striking them. The reasoning underlying *Buckley*'s bifurcated standard has not weathered the test of time. Moreover, even if this Court upholds "closely drawn" scrutiny for direct contributions to candidates, the aggregate contribution limits at issue in this case are very different from other contribution limits; aggregate contribution limits inflict greater infringements of association, but raise none of the *quid pro quo* concerns that might justify "closely drawn" scrutiny.

Alternatively, even under "closely drawn" scrutiny, the aggregate contribution limits impose severe burdens on the rights of speech and association for both the putative contributor and the putative recipients of

the prohibited contributions. In view of the restrictions on earmarked contributions and the unrealistic prospect that a contributor could channel excessive funds to a preferred candidate, the aggregate limit is not closely drawn to serve any significant government interest. Indeed, even though the current aggregate limit, considered in isolation, would allow an unscrupulous contributor to channel as much as $123,200—over *47 times* the $2,600 limit—to a preferred candidate through other candidates and political committees, the Government has come forward with no evidence that any contributor has successfully done so. Other restrictions in the Federal Election Campaign Act ("FECA"), as amended, 2 U.S.C. §§ 431 *et seq.*, and its accompanying regulations, prevent this prospect.[3]

I. AS WITH POLITICAL EXPENDITURES, STRICT SCRUTINY MUST APPLY TO POLITICAL CONTRIBUTIONS.

The Court first distinguished the scope of review applicable to contribution limits from the scope of review applicable to expenditure limits in *Buckley,* 424 U.S. at 24-31. The Court deemed the "restriction of one aspect of the contributor's freedom of political association" to be "the primary First Amendment problem" raised by contribution limits. *Id.* at 24. Although recognizing that the right of association is a

---

[3] Indeed, in the lone instance cited below by the Government, in which the Democratic Senatorial Campaign Committee ("DSCC") "tallied" contributions for Senate candidates, the DSCC admitted violating the earmarking provision (but not the aggregate limit) provision. *See* p. 27 n. 16 below.

"basic constitutional freedom," the Court held that "[e]ven a '*significant interference* with protected rights of political association may be sustained if the State demonstrates a *sufficiently important interest* and employs *means closely drawn to avoid unnecessary abridgement* of associational freedoms." *Id.* at 25 (emphasis added) (citations and internal quotation marks omitted); *see also Davis v. FEC*, 554 U.S. 724, 737-38, n.7 (2008). Because it deemed the contribution limits in FECA to be "closely drawn" to address actual or apparent *quid pro quo* corruption, the Court concluded "under the rigorous standard of review established by our prior decisions, the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the [contribution limit]." *Buckley*, 424 U.S. at 25, 29. In contrast, the Court struck down the expenditure limits after subjecting them to the "exacting scrutiny applicable to limitations on core First Amendment Rights of political expression." *Id.* at 44-45.

Subsequent decisions have clarified that the Court applies "strict scrutiny" to limits on political expenditures. "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 340 (citations omitted). Yet, the Court continues to use so-called "closely drawn" scrutiny to review limits on political contributions. This "relatively complaisant review" of contribution limits, *Beaumont*, 539 U.S. at 161, improperly diminishes the importance of contributions to core political speech and association,

has become a formulaic caricature that invites word play rather than rigorous constitutional analysis, and has drawn repeated and compelling criticism from Members of this Court. The time has come for the Court to revisit the distinction. *See Citizens United*, 558 U.S. at 363 ("'This Court has not hesitated to overrule decisions offensive to the First Amendment.'") (citations omitted).

A. Political Contributions Are Central Elements of Core Political Speech and Association.

The Court recognized in *Buckley* that both "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities," to which "[t]he First Amendment affords the broadest protection." 424 U.S. at 14. Both "contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties." *Id.* at 18. Further, "[t]he First Amendment protects political association as well as political expression." *Id.* at 15. Association "undeniably enhance[s]" effective advocacy. *Id.* (citation omitted). Importantly, the Court recognized that "it is beyond dispute that the interest in regulating the alleged 'conduct' of giving or spending money 'arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful.'" *Id.* at 17 (citations omitted).

Contribution limits restrict the rights of speech and association of both the contributor and the recipient of the contribution. For the contributor, an investment of

money is both a symbolic show of support and affiliation, but it is also tangible and quantifiable. Not all persons have the name recognition of a George Clooney, a Bruce Springsteen, or a Donald Trump, from whom a public endorsement or appearance would possibly carry weight. Nor do all people have the free time, skills, or proximity to be effective campaign volunteers. Thus, for many if not most persons, a contribution of money is by far the most effective means of supporting a preferred candidate. And, just as intensity of support can be divined by the number of volunteer hours spent, for many if not most contributors the intensity of support is directly related to the size of the check.[4]

For the recipient, whether candidate or committee, contributions also implicate the rights of speech and association. Contributions directly enable speech, and allow "candidates and political committees [to] amass[] the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. *See also Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (opinion of Breyer, J., announcing judgment of the Court) (holding that Vermont contribution limits prevented candidates from amassing sufficient resources). But recipients of contributions also have a First Amendment right to associate with many contributors, and to associate at

---

[4] *See* David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 Colum L. Rev. 1369, 1374 (1994) ("At the ballot box, a voter has a difficult time showing how enthusiastically she supports a candidate . . . . By contrast, a contributor can spend her money in direct proportion to the intensity of her views.").

varying levels of intensity.[5] Campaigns and political party committees generally communicate more frequently and extensively with large contributors, invite them to events, and involve them more fully in their campaigns and other efforts.[6]

In short, it is no exaggeration to say that political contributions are not only an avenue of symbolic political expression, but are also a concrete and tangible expression of support that enables the political speech at the core of the American political process. As Chief Justice Burger correctly observed in his *Buckley* dissent many decades ago, contributions and expenditures are simply "two sides of the same First Amendment coin," and the effort to distinguish them has produced mere "word games." 424 U.S. at 241, 244 (Burger, C.J., concurring in part and dissenting in part).

---

[5] *Cf.* Treas. Reg. § 56.4911-5(f)(1)(i) (a person is a "member" of a charity and qualified to receive certain exempt communications only if the person "makes a contribution of *more than a nominal amount*.") (emphasis added).

[6] *See, e.g.*, Arizona Democratic Party, *Join the Arizona Democratic Council*, http://azdem.org/action/contribute/adc/ levels/ (last visited May 7, 2013) (high contributors receive tickets to election night parties); Republican Party of Arkansas, *Contribute—Business Counsel*, http://www.arkansasgop.org/ index.cfm?p=business-council (last visited May 7, 2013) (high contributors may attend quarterly briefing calls with key Virginia elected officials); and Georgia Democrats, *Georgia Democrats Yellow Dog Club*, http://www.georgiademocrat.org/ contribute/yellow-dog-club/ (last visited May 7, 2013) (high contributors receive regular "insider" updates and invitations to regular conference calls on the "State of the State Party").

B. Complaisant Review of Contribution Limits Is Unfounded and Illogical.

Buckley justified a less rigorous standard of review for contributions on the ground that contribution limits primarily (but not exclusively) restrict associational freedoms, rather than expressive freedoms. 424 U.S. at 24. Notwithstanding the dual effect of contribution limits on associational and expressive freedoms, the Court has "proceeded on the understanding that a contribution limitation surviving a claim of associational abridgment would survive a speech challenge as well." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 388 (2000). According to *Buckley*, whereas "[a] restriction on the amount of money a person or group can *spend* on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached," "a limitation upon the amount that any one person or group may *contribute* to a candidate or political committee entails *only a marginal restriction upon the contributor's ability* to engage in free communication." 424 U.S. at 19, 20-21 (emphasis added).

Buckley provided four reasons for less stringent review of contribution limits:

> [1] A contribution serves as a general expression of support for the candidate and his views, but *does not communicate the underlying basis for the support*. [2] The quantity of communication by the contributor *does not increase perceptibly with the size of his contribution*, since the

> expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a *very rough index of the intensity* of the contributor's support for the candidate. [3] The limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it *permits the expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues*. [4] While contributions may result in political expression if spent by a candidate or an association to present views to the voters, *the transformation of contributions into political debate involves speech by someone other than the contributor*.

Id. at 21 (emphasis added). Experience shows that this reasoning does not withstand careful analysis.

At the outset, these four justifications for less rigorous scrutiny of contribution limits address only the *expressive* value of the contribution, whereas the *Buckley* Court recognized that "the primary First Amendment problem" with such limits is their infringement of the right of *association*. *Id.* at 24. Although *Buckley* deemed contribution limits only a "marginal" restriction on the right of association, it never justified its assumption that a $1 contribution is equivalent in its power to associate to a $1,000 contribution. That proposition is not self-evident, and is rebutted by the fact that so many contributors—most of whom have no agenda other than to support the

candidate, party, or cause—give the maximum amounts allowed by law.

Nor are the four justifications for restraining the expressive element of contributions persuasive. *Buckley's* first justification for less rigorous review of contribution limits—that a contribution is "a general expression of support for the candidate and his view," but does not state "the underlying basis for support"—is flawed for two reasons. To start, a campaign message stating "I endorse Jones" is entitled to no less protection than a message stating "I support Jones because he favors low taxes and limited government." Moreover, the Court has never required a speaker to state the reason for a symbolic act, such as flag burning, in order to obtain full First Amendment protection. *See Texas v. Johnson*, 491 U.S. 397, 406, 412 (1989) (applying "the most exacting scrutiny" to reverse a conviction under Texas flag desecration statute); *United States v. Eichman*, 496 U.S. 310, 318 (1990) (applying strict scrutiny to invalidate a statute prohibiting flag burning). *See also Virginia v. Black*, 538 U.S. 343, 365 (2003) (invalidating a cross burning statute because of its *prima facie* assumption that the burning was for the purpose of intimidation rather than speech).

The second justification—that "the quantity of communication by the contributor does not increase perceptively with the size of his contribution" and is merely "a very rough index of the intensity" of support—is also unpersuasive. Again, the precedents of this Court do not require speech to be made with any reasoning, or at any particular decibel level or font size, for full First Amendment protection. Moreover, the

amount of a contribution does, indeed, show the intensity of support. If a contributor feels more strongly about candidate A than about candidate B, he may give a larger contribution to candidate A. The contribution decision is not merely binary—contribute or don't contribute—but involves a critically important intensity component as well. Publicly available data demonstrate that individual contributors do give varying amounts of money to different candidates.[7]

Even if variations in contribution amounts are "a very rough index of the intensity of the contributor's support for the candidate," the amount contributed is the *best*, if not the *only*, index of such intensity. Words spoken, events attended, or doorbells rung might also indicate intensity of support for some people, but the difference between a contributor's $100 contribution to candidate Jones versus a $2,600 contribution to candidate Smith sends a strong and quantifiable message of association and support, and can be just as

---

[7] For example, during the 2012 election cycle, public figures including Donald Trump, Mayor Michael Bloomberg, and Aaron Sorkin contributed varying amounts to different candidates. Mr. Trump contributed $1,000 to former Congressman Allen West while contributing the maximum amount to former Senate candidate Linda McMahon. Similarly, Mayor Bloomberg donated $1,000 to Congressman Grace Meng and the maximum contribution to Senator Tim Kaine. Mr. Sorkin contributed $1,000 to Senator Elizabeth Warren while contributing the maximum amount to former Congressman Howard Berman. *See* Federal Election Commission, *Query by Individual Contributor*, http://www.fec.gov/finance/disclosure/ advindsea.shtml (search "Donald Trump," "Michael Bloomberg," and "Aaron Sorkin") (last visited May 7, 2013).

meaningful, or more so, than wearing a button or posting a yard sign.

Third, the notion that a contribution limit "permits the symbolic expression of support . . . but *does not in any way infringe the contributor's freedom to discuss candidates and issues*," *Buckley*, 424 U.S. at 21 (emphasis added), suggests that contribution limits are allowable merely because other avenues of speech remain available. This notion discounts the central importance of contributions to the funding of *all* candidate political speech. A contributor may make a maximum contribution and continue "to discuss candidates and issues," but the coordination rules prevent such additional speech in coordination with the candidate. Speech *by the candidate*, paid for with contributions from supporters, is far more effective than the independent speech of a supporter. *Cf. FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) ("*NCPAC*") ("The absence of prearrangement and coordination undermines the value of the expenditure to the candidate"). Most fundamentally, the existence of alternative avenues of expression is not a justification for limiting one important avenue. For example, it is unlikely this Court would condone a statute prohibiting radio appearances by candidates so long as they could also appear on television. *Cf. Citizens United*, 558 U.S. at 326 ("We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.").

Finally, the *Buckley* Court justified less rigorous review of contribution limits on the ground that "the

transformation of contributions into political debate involves speech by someone other than the contributor." 424 U.S. at 21. Again, this justification is not well reasoned. The line between "contributions" and "expenditures" is not always clear. *See Jurisdictional Statement Appendix* 7a ("[W]e acknowledge the constitutional line between political speech and political contributions grows increasingly difficult to discern"); *see also Nixon*, 528 U.S. at 405 (Breyer, J., concurring) (hypothesizing "making less absolute the contribution/expenditure line," and citing as an example candidate expenditures from personal funds which "might be considered contributions to their own campaigns"). As an example, FECA deems all expenditures made in coordination with a candidate to be "contributions" to that candidate, even when the coordinated expenditures are pure speech. *See* 2 U.S.C. § 441a(a)(7)(B)(i). Coordinated political advertising has just as much expressive content as non-coordinated advertising. And, even though statutorily exempted from the definition of contribution, 2 U.S.C. § 431(8)(B)(i), volunteer services ranging from doorbell ringing to concerts performed by volunteer rock stars are services "of value" that have an expressive component. Were Congress to treat volunteer services as "contributions," the Court's jurisprudence on contribution limits suggests they would *not* receive full First Amendment protection.

The blurred—but outcome determinative—distinction between contribution and expenditure limits pervades this Court's recent jurisprudence. In *FEC v. Colo. Republican Federal Campaign Comm.*, 533 U.S. 431, 446 (2001), this Court upheld, under the less rigorous standard of review, the coordinated

expenditure limit for political parties. It did so notwithstanding that the "contributions" at issue in that case were *core political speech*—advertisements aired by a political party committee in coordination with candidates. The Court divided on whether to deem the advertisements "contributions" or "expenditures." *Compare id.* at 456 ("scrutiny appropriate for a contribution limit"), *with id.* at 467-68 (Thomas, J., dissenting, joined by Scalia and Kennedy, J.J.) (disagreeing with characterization).

Moreover, in *McConnell v. FEC*, the Court applied the less rigorous review standard to uphold section 323 of BCRA, 2 U.S.C. § 441i(a)(1), which states: "the national committee of a political party . . . may not *solicit, receive, or direct* to another person a contribution, donation, or transfer of funds or any other thing of value, or *spend any funds*, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." (emphasis added). The Court reasoned that the provision did not become an expenditure limitation merely because it "prohibit[ed] the spending of soft money." 540 U.S. at 139. "[I]t is irrelevant," the Court wrote, "that Congress chose in § 323 to regulate contributions on the demand rather than the supply side." *Id.* at 138. The Court also deemed the speech inherent in solicitation of contributions to be subject to the less rigorous standard. *Id.* at 140. *But see id.* at 266, 272 (opinion of Kennedy, J.) (criticizing the majority's denomination of section 323 as a contribution limit because it "exchanges *Buckley*'s substance for a formulaic caricature of it;" the provisions "are neither contribution nor expenditure limits, or perhaps both at once"); *id.* at 309 (Thomas, J., dissenting) (disagreeing

with conception of statute "as nothing more than a contribution limit," and lamenting "the steady decrease in the level of scrutiny applied to restrictions on core political speech"). In short, the supposition that campaign money falls neatly into the category of nonexpressive "contributions" versus expressive "expenditures" is belied by the very jurisprudence of this Court.

Notwithstanding the *Buckley* Court's focus on the rights of the contributor, the Government now contends that "the constitutionality of a contribution limit is analyzed from the perspective of the recipient, not the contributor." Appellee's Mot. Dismiss or Affirm 24 ("Gov't Motion"). It is true that one avenue of challenging contribution limits is to show that they are so severe as to prevent "candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. This Court has found this high standard met only once in 37 years, formulating a case-specific five factor test that may prove difficult to apply in future cases. *See Randall*, 548 U.S. at 253-62. As shown above (pp. 7-8), candidates and political committees rely on the *amount* of contributions to engage in core political speech, not just on their symbolic, associational value. The demanding "amassing resources" standard, however, assumes that, at any specific contribution limit, the candidate—however unknown at the outset of his candidacy—can successfully appeal to a large number of potential contributors to "amass" campaign resources. Under a regime of contribution limits—including aggregate limits—the better known candidate (usually the incumbent) has an inherent

advantage. Complaisant review of contribution limits entrenches that advantage.

C. Justices of This Court Have Repeatedly and Consistently Questioned the More Relaxed First Amendment Review of Contribution Limits.

These analytical shortcomings of the contribution-expenditure limit dichotomy have not gone unnoticed by the Justices of this Court. Four of the eight Justices participating in *Buckley* eventually rejected the dichotomy as constitutionally flawed. In *Buckley*, Chief Justice Burger and Justices Blackmun and White questioned the logic of the dichotomy. Chief Justice Burger observed that "[t]he Court's attempt to distinguish the communication inherent in political contributions from the speech aspects of political expenditures simply 'will not wash.'" 424 U.S. at 244 (Burger, C.J., concurring in part and dissenting in part). Noting that "contributions and expenditures are two sides of the same coin," he predicted that "[l]imiting contributions, as a practical matter, will limit expenditures and will put an effective ceiling on the amount of political activity that will take place." *Id.* at 241-42. Justice Blackmun reached a similar conclusion, writing that he was "not persuaded that the Court makes, or indeed is able to make, a principled constitutional distinction between the contribution limitations on the one hand, and the expenditure limitations on the other." *Id.* at 289 (Blackmun, J., concurring in part and dissenting in part). Justice White also questioned the logic. *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). And nine years after joining the portion of

Buckley distinguishing contributions from expenditures, Justice Marshall admitted that "the distinction has no constitutional significance." *NCPAC*, 470 U.S. at 519.[8]

While the composition of the Court has changed since *Buckley*, the criticism of this bifurcated standard of review has not abated. Justice Thomas has argued

> [C]ontribution limits infringe as directly and seriously upon freedom of political expression and association as do expenditure limits. The protections of the First Amendment do not depend upon so fine a line as that between spending money to support a candidate or group and giving money to the candidate or group to spend for the same purpose. In principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy. I think the *Buckley* framework for analyzing the constitutionality of campaign finance laws is deeply flawed.
>
> . . . [T]here is no constitutionally significant difference between campaign contributions and expenditures: Both forms of speech are central

---

[8] While Chief Justice Burger and Justice Blackmun advocated full First Amendment protection for contributions, Justices White and Marshall advocated greater regulation of expenditures. All four agreed that the distinction between contributions and expenditures was not material to First Amendment analysis.

> to the First Amendment. Curbs on protected speech, we have repeatedly said, must be strictly scrutinized.

Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 640 (1996) (Thomas, J., concurring in part and dissenting in part).[9] Justice Kennedy has also criticized this distinction, noting that "by accepting half of what Congress did (limiting contributions) but rejecting the other (limiting expenditures)," *Buckley* created a "half-way house" and a "misshapen system [that] distorts the meaning of speech." *Nixon*, 528 U.S. at 407, 410; *see also McConnell*, 540 U.S. at 311 (Kennedy, J., concurring in part and dissenting in part) (referring to the less rigorous review of contribution limits in *Buckley* as "[u]nworkable and ill advised").[10]

---

[9] *See also, e.g.*, *Beaumont*, 539 U.S. at 164 (Thomas, J., dissenting) (stating that "campaign finance laws are subject to strict scrutiny," and "under strict scrutiny, broad prophylactic caps on . . . giving in the political process are unconstitutional"); *Randall*, 548 U.S. at 266 (Thomas, J., joined by Scalia, J., concurring on the judgment) ("I adhere to my view that this Court erred in *Buckley* when it distinguished between contribution and expenditure limits.").

[10] In *Randall*, two Justices noted that the parties did not challenge the *Buckley* framework. 548 U.S. at 263 (Alito, J., concurring in part); *id.* at 264 (Kennedy, J., concurring in the judgment).

D. *Stare Decisis* Does Not Justify Adherence to the Unworkable and Ill-Advised Complaisant Review of Contribution Limits.

Stare decisis does not compel adherence to the "half-way house" of *Buckley*. In determining whether to follow the policy of *stare decisis*, this Court considers the workability of the prior decision, the age of the precedent, the reliance interests in the precedent, practical experience after the decision was handed down, and "of course, whether the decision was well reasoned." *Montejo v. Louisiana*, 556 U.S. 778, 792-93 (2009). But "*stare decisis* is neither an inexorable command, nor a mechanical formula of adherence to the latest decision, especially in constitutional cases." *Citizens United*, 558 U.S. at 377 (Roberts, C.J., concurring) (quotations omitted). Instead, it is a prudential policy that "promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). This Court has a "considered practice" not to apply this policy "as rigidly in constitutional as in nonconstitutional cases," *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962), because "corrective action [in constitutional cases] through legislative action is practically impossible." *Payne*, 501 U.S. at 828 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)). Thus, "[t]his Court has not hesitated to overrule decisions offensive to the First Amendment." *Citizens United*, 558 U.S. at 363 (citation omitted).

Accordingly, *amicus* Senator Mitch McConnell urges the Court to reconsider the application of less rigorous scrutiny for contribution limits, and to accord full First Amendment protection to contributions by applying strict scrutiny to all contribution limits.

E. Even If the Court Does Not Reconsider "Closely Drawn" Scrutiny for All Contribution Limits, Strict Scrutiny Is Appropriate for Aggregate Limits.

As shown, the justification for lower scrutiny of contribution limits simply "does not wash." But even if this Court declines to revisit the use of "closely drawn" scrutiny for all contributions, it should apply strict scrutiny to the aggregate limits at issue here.

First, even without the aggregate limits, the individual contribution limits are sufficient to address concerns about *quid pro quo* corruption. Those limits prevent any contributor from making direct contributions to any candidate, political committee, or national or state party committee in an amount likely to cause actual or apparent corruption. The direct transaction with the candidate—the purported "money for political favors"—underlies both the contribution limits themselves and the First Amendment review of those limits. *See NCPAC*, 470 U.S. at 497 ("Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns."). As a result, the justification for an aggregate limit—however phrased—differs in a material sense from the justification for limits on direct contributions. *Cf.*

Jurisdictional Statement Appendix 10a ("Yet if anything is clear, it is that contributing a large amount of money does not *ipso facto* implicate the Government's anticorruption interest. The Government's assertion that large contributions 'could easily exert a corrupting influence on the democratic system' and would present 'the appearance of corruption that is "inherent in a scheme of large individual financial contributions"' simply sweeps too broadly.").

Second, the Court has explained that "the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association." *Beaumont*, 539 U.S. at 161. The effect of the aggregate limits is to prohibit association with additional candidates or political committees once the contributor reaches the aggregate limit. Even if a limit on the *amount* of money a contributor may give to a particular candidate is but a "marginal restriction" on the contributor's right to associate with *that* candidate, the aggregate limits go further. Once the contributor reaches the threshold through association with other candidates, the aggregate limits *prohibit association* with *additional* candidates. Thus, the aggregate limits do more than *restrict* association; they *prohibit* it outright, and should be reviewed under strict scrutiny. If so reviewed, the aggregate limits offend the First Amendment and must fall.

II. THE AGGREGATE LIMIT ON INDIVIDUAL CONTRIBUTIONS TO CANDIDATES OFFENDS THE FIRST AMENDMENT.

The aggregate limit on individual contributions to federal candidates has no legitimate purpose and cannot withstand even "closely drawn," much less strict, scrutiny. Section 441a(a)(3)(A) provides that, during each biennial election cycle, "no individual may make contributions aggregating more than—(A) [$46,200] in the case of contributions to candidates and the authorized committees of candidates." Congress has determined, in provisions not at issue here, that an individual may contribute up to $2,600 per election to any federal candidate without corrupting or appearing to corrupt that candidate. In compliance with that non-corrupting limit, the aggregate limit allows an individual to give full support, by contributing the maximum $5,200 ($2,600 each for primary and general elections), to only 17 federal candidates per election cycle. Support of *any* candidate at *any* level once the $48,600 level is reached is a crime, punishable by up to five years in prison. 2 U.S.C. § 437g(d)(1)(A)(i).

A. Section 441a(a)(3) Abridges the Rights of Speech and Association.

Once a contributor has exhausted the aggregate limit, Section 441a(a)(3) prohibits any further financial association with any other candidate. Recent decisions recognize that an outright prohibition on contributions does not pass even the complaisant standard of *Buckley*. In *Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010), the Second Circuit upheld Connecticut's ban on political contributions by state

contractors because of a recent bribery scandal involving contractors, but struck down a ban on political contributions by lobbyists because "the recent corruption scandals had nothing to do with lobbyists," *id.* at 206, and a ban "cuts off even 'the symbolic expression of support evidenced by' a small contribution," *id.* (quotation omitted). Similarly, in *Lavin v. Husted*, 689 F.3d 543 (6th Cir. 2012), the Sixth Circuit struck down Ohio's ban on political contributions by Medicaid providers because the State lacked evidence that Medicaid providers had been involved in bribery, and "the contribution ban is not closely drawn." *Id.* at 548. In both decisions, the courts emphasized that an outright ban on contributions, and the speech and association that they represent, could not be deemed "closely drawn."

B. No Justification for the Aggregate Limit on Contributions to Candidates Can Salvage It.

It is true that the Court in *Buckley* upheld the then-existing $25,000 aggregate limit. But in *Buckley*, the aggregate limit had *not* "been separately addressed at length by the parties." 424 U.S. at 38. The Court upheld it as a "quite modest restraint upon protected political activity" which "serve[d] to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Id.* As Appellants point out, Congress has thoroughly addressed the concerns about evasion of the candidate

contribution limit in multiple ways.[11] First, the statutory earmarking provision attributes all earmarked contributions back to the earmarking contributor. 2 U.S.C. § 441a(a)(8). Second, Congress has limited the proliferation of contributions to affiliated committees. 2 U.S.C. § 441a(a)(7). Third, it has imposed limits on contributions to party committees. 2 U.S.C. § 441a(a)(1)(B), (D).

The aggregate limit on contributions to candidates serves no legitimate purpose. First, it does not prevent *quid pro quo* corruption. In response to a colleague's argument against raising the aggregate limit during legislative debate on BCRA, Senator Thompson responded "[n]o one person is receiving more than $2,500. *So you don't have a corruption issue.*" 147 Cong. Rec. 4585, 4631 (2001) (emphasis added). The very same reasoning undermines the entire aggregate limit.

Second, the Government's hypothesis that the aggregate limit prevents evasion of the contribution limit to individual candidates does not withstand analysis. Any "directly or indirectly" earmarked contributions channeled through one candidate or committee to another candidate is deemed a contribution to the designated candidate, 2 U.S.C. § 441a(a)(8), thus limiting the contributor to a single $2,600 contribution. In view of this earmarking provision, a contributor may do no more than *hope* his contributions to other candidates end up in the hands of his preferred candidate. It is, of course, unrealistic to

---

[11] Brief for Appellant McCutcheon 41-43; Brief for Appellant RNC 19-24.

think that a contributor to numerous candidates could, without "directly or indirectly" saying anything, telepathically "will" those contributions into the hands of a single preferred candidate. Each candidate that received a $2,600 contribution from the individual would need to make independent decisions whether to keep the money for his or her own campaign, or transfer it to another candidate, and if so to which candidate.

Also, since *Buckley*, so-called "Super PACs" may now accept unlimited contributions from individuals for purposes of independent expenditures supporting a specific candidate.[12] During the 2012 election cycle, several candidates for President benefitted from such independent Super PACs. Restore Our Future raised and spent $142 million in support of Mitt Romney and against Barack Obama, Rick Santorum, and Newt Gingrich.[13] Priorities USA Action raised and spent $65.2 million in support of Barack Obama and against Mitt Romney.[14] Winning Our Future raised and spent $17 million in support of Newt Gingrich and against

---

[12] *See* Center for Responsive Politics, *Super PACs*, http://www.opensecrets.org/pacs/superpacs.php?cycle =2010 (last visited May 7, 2013).

[13] *See* Center for Responsive Politics, *Winning Our Future Independent Expenditures*, http://www.opensecrets.org/pacs/indexpend.php?strID=C00490045&cycle=2012 (last visited May 7, 2013).

[14] *See* Center for Responsive Politics, *Priorities USA Action Independent Expenditures*, http://www.opensecrets.org/pacs/indexpend.php?strID=C00495861&cycle=2012 (last visited May 7, 2013).

Mitt Romney and Barack Obama.[15] Whatever salutary effect the aggregate limit might have had at one time in limiting individuals from channeling contributions to benefit particular candidates, it is now clear that the aggregate limit has failed.

If the earmarking restriction were ineffective—which *amicus* doubts—contributors so inclined may already channel numerous $2,600 contributions through multiple candidate committees to a single preferred candidate, in full compliance with the $48,600 candidate aggregate limit and the $123,200 total aggregate limit. Without violating the aggregate limit—and setting aside the earmarking restriction—an unscrupulous contributor could channel to a preferred candidate *over 18 times* the maximum $2,600 candidate contribution through candidate committees, or by using political committees and parties *over 47 times* the $2,600 limit. Yet, apart from the wholly distinguishable and unpersuasive "tally program" example,[16] the Government has submitted *no*

---

[15] *See* Center for Responsive Politics, *Winning Our Future Independent Expenditures*, http://www.opensecrets.org/pacs/indexpend.php?strID=C00507525&cycle=2012 (last visited May 7, 2013).

[16] In its Motion To Dismiss or Affirm, the Government relied, as it has repeatedly over the years, upon the DSCC's "tally" program from two decades ago. Gov't Motion 18, 20. In August 1995, however, the DSCC entered a Conciliation Agreement, admitting that the tally program violated the earmarking provision (but not the aggregate limits). *In the Matter of Democratic Senatorial Campaign Committee, et al.*, MUR No. 3620 (Aug. 16, 1995), found at p. 687 of http://www.fec.gov/disclosure_data/mur/3620.pdf. The DSCC agreed to pay a $75,000 penalty, refund or forward the

evidence whatsoever that any such channeling of contributions *is* occurring or *has ever* occurred. This must mean either that the earmarking restriction *is effective*—as it was to stop the abusive "tally program"—or that contributors are *not* inclined to channel contributions through other entities to their preferred candidates. Absent evidence of a real problem, the aggregate limits must fail. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (Government bears the burden of proving "that the recited harms are real, not merely conjectural").

The Government has also suggested that some (but not all) candidates in "safe" districts sometimes transfer money to candidates in "competitive" districts. Gov't Motion 20. But this suggestion is a far cry from sufficient proof. A contributor wishing (without saying so) to channel multiple candidate contributions to a preferred candidate may or may not prefer a candidate in a competitive district. Further, each cycle there are many competitive districts,[17] so even if the contributor intended a transfer to a competitive race, the contributor would have only a slight chance that his

---

designated contributions, engage in training programs for its staff, and use standard solicitation language. The FEC recently rescinded the Agreement because of the DSCC's compliance. Federal Election Commission, *MUR 3620 (Democratic Senatorial Campaign Committee) – Request to Modify Conciliation Agreement*, Agenda Doc. No. 12-79 (Nov. 9, 2012), *available at* http://www.fec.gov/agenda/2012/mtgdoc_ 1279.pdf.

[17] *See, e.g.*, The Cook Political Report, *2012 House Race Ratings for November 1, 2012*, http://cookpolitical.com/house/ charts/race-ratings/5084 (last visited May 7, 2013) (listing 65 House of Representative races as "competitive").

contribution would be transferred to the precise race he or she wanted. And the notion that *many* transferring candidates would independently choose to transfer the contributor's money to the *same* preferred candidate makes the suggestion wholly fanciful. Finally, it bears noting that any amounts transferred would be from the transferring committee's undifferentiated account containing all contributions received during the cycle, not just the single contribution from this unscrupulous contributor.

Also in its Motion To Dismiss or Affirm, the Government recites the dairy industry's funneling of contributions through "hundreds of committees in different States, 'which could then hold the money for the President's reelection campaign.'" Gov't Motion 2-3 (citing *Buckley v. Valeo*, 519 F.2d 821, 839, n.36 (D.C. Cir. 1975) (*per curiam*), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976)). Congress has already addressed, in a more direct way, this threat of multiple committees affiliated with the same candidate. The $2,600 limit on contributions by an individual and the $5,000 limit on contributions by multicandidate political committees apply to contributions to "any candidate and [all] his authorized political committees." 2 U.S.C. §§ 441a(a)(1)(A), 441a(a)(2)(A) (emphasis added). The aggregate limit plays no role in addressing this concern because contributions to any and all committees of the same candidate are already subject to a single limit.

Although relying primarily on the evasion rationale, the Government obliquely acknowledges that the real purpose of the aggregate limit is to reduce the influence of large contributors. The Government quotes the legislative history from 1974, when the original

aggregate limit was enacted. Gov't Motion 2. There, Congressman Brandemas said the aggregate limit was intended to "curtail the influence of excessive political contributions by any single person." 120 Cong. Rec. 27, 224 (1974). The legislative history of BCRA also strongly suggests that "leveling the playing field" was at least one consideration behind this limit. *See* 147 Cong. Rec. 4585, 4625 (2001) (statement of Sen. Feingold) (criticizing a $100,000 aggregate limit as "a staggering sum to most people . . . this bill is about lessening the influence of money on politics. It is not about increasing it."); 147 Cong. Rec. 4585, 5198 (2001) (statement of Sen. Kerry) ("This increase [in the aggregate limits] simply enables the tiniest percentage of the population that currently contributes large contributions to contribute even more. This increase does nothing at all to increase the role the average voter plays in our election process.").

Since *Buckley*, it has been firmly established that "leveling the playing field" or equalizing speech is not a legitimate basis for campaign finance regulation. As the *Buckley* Court put it: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." 424 U.S. at 48-49; *see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech"); *Citizens United*, 558 U.S. at 341; *Davis*, 554 U.S. at 741-42.

The Government suggests that "contribution limits, unlike expenditure limits, are not speech-equalization measures" because contributors remain free to spend independently to promote candidates. As the quotations from the legislative history show, however, Congress *did* view aggregate limits as "speech equalization measures." By limiting the total amount of direct candidate support any one individual can provide in any two year period, the aggregate limits certainly have that effect. And, as the Court has held for four decades, contributions contain an element of speech, meaning equalization is no more appropriate to justify contribution limits than it is to justify expenditure limits.

The Government next suggests that the concern is not with equalization, but with "improper influence" resulting from a single contributor making a large dollar value of contributions to different candidates. Gov't Motion 13. This is not, however, the "improper influence" of a direct contribution to a candidate, which might threaten *quid pro quo* corruption. Rather, it is the "improper influence" purportedly garnered by a large contributor from a grateful party establishment. This Court has now made clear that such "ingratiation" is not corruption and thus not sufficient to sustain a restraint on First Amendment freedoms. *Citizens United*, 558 U.S. at 360 ("Ingratiation and access, in any event, are not corruption.").

In short, it is far too late in the day for the Government to argue that any restriction on campaign speech or association may be justified by concerns about "too much money in politics" or "leveling the playing field." Yet, with the existing prophylaxis

against earmarked contributions, there can be no other justification for the aggregate limit on individual contributions to candidates. Accordingly, the $48,600 aggregate limit on contributions to candidate committees must fall.

III. AGGREGATE LIMITS ON INDIVIDUAL CONTRIBUTIONS TO NON-CANDIDATE POLITICAL COMMITTEES OFFEND THE FIRST AMENDMENT.

Section 441a(a)(3)(B) sets an aggregate limit of $74,600 "in the case of other contributions, of which not more than [$48,600] may be attributable to contributions to political committees which are not political committees of national political parties." An individual may contribute no more than $32,400 to any national political party in any calendar year. The aggregate *biennial* limit for individual contributions to all political committees is $74,600. This $74,600 limit encompasses individual contributions to *all six* national party committees, *all* state parties, and *all* unaffiliated political committees (including the separate segregated fund established by the contributor's employer).

This scheme means that an individual could give $64,800 ($32,400 multiplied by two) to a single national party committee over two years, and then have a total of only $9,800 in that election cycle to give to all other national party committees, any state party committees, any multi-candidate committee, and his or her employer's separate segregated fund. As shown (Part I above), strict scrutiny is appropriate, but these aggregate limits cannot pass even "closely drawn" scrutiny.

Multi-candidate political committees that are not party committees confront annual limits, not changed in four decades, of $5,000 on contributions they can *accept* from individuals, $5,000 on contributions they can *make* to candidates or other committees, and $15,000 on contributions they can *make* to national party committees. 2 U.S.C. §§ 441a(a)(1)(C); 441a(a)(2)(A), (C), (B). The notion that a contributor could "contribute massive amounts of money to a particular candidate" in increments of $5,000 when it is illegal to instruct or suggest that the political committee direct those funds is too speculative to warrant serious consideration.

A. The Aggregate Limit on Contributions to National Political Party Committees Is Not Closely Drawn To Serve Any Government Interest.

The risk of evasion—channeling "massive amounts" of money to individual candidates—is fanciful for donations to national political parties. The prohibition against earmarking is fully applicable to contributions made to such party committees, as demonstrated by the successful enforcement action against the DSCC's "tally program." *See* p. 27, n.16 above. Further, the Act ties together the coordinated expenditure limits of national and state political party committees for both Senate and House races. *See* 2 U.S.C. §§ 441a(d)(1), (3). For senatorial candidates, the statute further addresses the prospect of channeling by limiting contributions to $45,400 per Senate candidate by "any combination of [national party] committees." 2 U.S.C. § 441a(h). Congress expressly allows the separate national and state party committees to donate up to

$5,000 per calendar year to House candidates. *See* 2 U.S.C. §§ 441a(a)(2)(C), 441a(a)(5)(B). While theoretically possible for a state party to contribute to a House or Senate candidate in another state, the primary focus of most state parties is on candidates within their home states. The likelihood of indirect contributions through state parties on a large scale is quite small.[18] Thus, a contributor wishing to use national political party committees or state political party committees to evade the individual contribution limit will be sorely disappointed.

More fundamentally, each of those party committees has its own electoral priorities—House, Senate, Presidential, as well as state and local offices.[19] Without earmarking, it seems a wildly speculative investment to contribute money to numerous state parties on the mere hope that some substantial portion will end up with a single preferred candidate.

---

[18] A review of the 2012 contributions of Republican and Democratic state party committees from California, Florida, Ohio, Pennsylvania, Texas, and Virginia revealed only one instance in which a state party contributed to a House candidate in another state. *See* FEC, *Candidate Committee Viewer*, http://www.fec.gov/finance/disclosure/candcmte_info.shtml (search "Ohio Republican Party," select "2012" from "Two-Year Period" dropdown menu, and follow "Contributions to Committees" hyperlink) (transfer of $5,000 by the Ohio Republican Party to Luke Messer for Congress, representing Indiana's 6th congressional district).

[19] BCRA requires use of funds subject to FECA's limits for a broad range of state electoral activity. 2 U.S.C. § 441i(b); *McConnell*, 540 U.S. at 161-62.

The Government has contended that, absent the aggregate limit, a contributor could make the maximum non-corrupting contributions to each of the affiliated party committees in a total amount of $3.5 million. Gov't Motion 13. Make no mistake: the concern is *not* about *channeling* contributions through these committees to a preferred candidate. The real concern is with the *raw amount of money* a single individual could contribute in the absence of the aggregate contribution. This attempt to justify the aggregate limit as a naked restraint on too much individual speech is an affront to the First Amendment. Even at this extreme, however, $3.5 million would be only about 0.1% of the $3.1 billion spent during the 2012 election cycle on federal elections.[20]

It is true, of course, that political party committees may transfer money among themselves, *see* 2 U.S.C. § 441a(a)(4), but such transfers do not materially increase the risks purportedly addressed by the aggregate limit. As shown above, *see supra* pp. 33-34, coordinated expenditure limits of all parties are tied together, as is the limit on contributions to Senate candidates. More fundamentally, however, a contributor to political party committees has no control over where the contribution ends up, as shown by the Government's lack of proof of channeling.

---

[20] *See* Center for Responsive Politics, *2012 Overview Stats at a Glance*, http://www.opensecrets.org/overview/ (last visited May 7, 2013).

B. The Aggregate Limit on Contributions to Other Political Committees Is Not Closely Drawn To Serve Any Government Interest.

BCRA subdivides the aggregate limit for political committees by imposing a $48,600 biennial limit on contributions to political committees that are not national political parties. As shown (Part III.A. above), this subsidiary limit would be fully consumed if the contributor opted to give $74,600 in an election cycle to national party committees. Any further contribution to a state political party, his or her employer's separate segregated fund, or an unaffiliated political committee would be a crime.

Alternatively, if the contributor eschews contributions to national party committees, and donates up to the subsidiary limit of $48,600 applicable to political committees that are not national committees, the contributor will be forbidden from contributing to any other such committees. For example, if a contributor gave $5,000 per year to his or her employer's separate segregated fund ($10,000 over two years), $10,000 per year to his or her state political party ($20,000 over two years), and three donations of $5,000 apiece over a two year period to other multi-candidate political committees (totaling $15,000), the contributor would be very close to exhausting the subsidiary aggregate limit.

A politically active contributor with a passion for several issues such as low taxes, marijuana legalization, gun rights, fetal rights, health care, immigration reform, and national security will quickly

find the aggregate limit constraining. The right to associate with state and local party committees, issue-oriented political committees, and employer separate segregated funds is thus infringed, as is the ability of the contributor to have his or her voice fully heard as part of these groups. The aggregate limit also infringes the right of the political committees to receive the contributions and to convert those contributions into core political speech.

The Government argues that the greater number of political committees in existence today, and the greater ease in learning which candidates they support, make channeling contributions to candidates "even easier now than it was when *Buckley* was decided." Gov't Motion 12. Each of the two political committees cited as examples, however, support *scores* of candidates. In the 2012 cycle, NARAL announced support for 5 Senate and 36 House candidates and EMILY's List contributed to a total of 64 federal candidates. [21] This activity makes it impossible for a contributor to predict which candidate will benefit from his or her $5,000 contribution. Thus, the Government's best examples refute its argument.

---

[21] *See* Press Release, NARAL Pro-Choice America, *NARAL Pro-Choice America PAC Announces New Endorsements in Key House, Senate Contests To End War on Women* (April 3, 2012), *available at* http://www.prochoiceamerica.orgelections/elections-press-releases/2012/pr04032012_pac-endorsements.html (last visited May 7, 2013); Center for Responsive Politics, *Emily's List: All Recipients*, http://www.opensecrets.org/orgs/recips.php?id=d000000113 (contributions to President Obama and 50 House and 13 Senate candidates) (last visited May 7, 2013).

CONCLUSION

For the reasons set forth above, and in the briefs of Appellants RNC and McCutcheon, *amicus* Senator McConnell urges the Court to revisit the bifurcated standard of review for contribution and expenditure limits, hold that strict scrutiny applies to both, and hold that all aggregate contribution limits in BCRA are invalid under the First Amendment.

Dated: May 13, 2013

Respectfully submitted,

Bobby R. Burchfield
Counsel of Record
Matthew M. Leland
Brandon H. Barnes
Michael S. Stanek
Andrea M. Alegrett
Mary D. Hallerman
McDERMOTT WILL & EMERY LLP
500 N. Capitol St., N.W.
Washington, D.C. 20001
202.756.8000
bburchfield@mwe.com

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

JUL 25 2013

No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON AND
REPUBLICAN NATIONAL COMMITTEE
Plaintiffs-Appellants,
v.
FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF *AMICI CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, ET AL., IN SUPPORT OF APPELLEE

WILLIAM LURYE
JESSICA ROBINSON
American Federation of State, County and Municipal Employees
1625 L Street, N.W.
Washington, DC 20036
(202) 429-1293

JUDITH A. SCOTT
MARK SCHNEIDER
Service Employees International Union
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 730-7000

ALICE O'BRIEN
(*Counsel of Record*)
JASON WALTA
LISA POWELL
NICHOLAS MUELLER
National Education Association
1201 16th Street, N.W.
Washington, DC 20036
(202) 822-7035

LYNN K. RHINEHART
CRAIG BECKER
LAURENCE E. GOLD
American Federation of Labor-Congress of Industrial Organizations
815 16th Street, N.W.
Washington, DC 20036
(202) 637-5310

Penko DeLancey Printers, LLC - (301) 341-4800 - Cheverly MD

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
A. Aggregate Contribution Limits Must Be Reviewed Deferentially Under "Closely Drawn" Scrutiny	5
B. FECA's Aggregate Limits Do Not Significantly Interfere with Expressive or Associational Rights	8
C. FECA's Aggregate Contribution Limits Serve an Essential Function of Combating Corruption and the Public Perception of Corruption	14
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page
Buckley v. Valeo, 424 U.S. 1, (1976)	*passim*
Cal. Med. Assoc. v. FEC, 453 U.S. 182 (1981)	12
Citizens United v. FEC, 558 U.S. 310 (2010)	5, 14, 20
FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001)	15, 16, 18, 19
FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982)	19
McConnell v. FEC, 540 U.S. 93 (2003), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010)	*passim*
Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000)	*passim*

STATUTES AND REGULATIONS

2 U.S.C. § 441a(d)	16
29 U.S.C. § 206(a)(1)(C)	10
11 C.F.R. § 102.6(a)(1)(ii)	16
11 C.F.R. § 102.17	16
11 C.F.R. § 102.17(c)(1)	16
11 C.F.R. § 113(c)	16

MISCELLANEOUS

Abby Blass, Brian Roberts, Daron Shaw, *Corruption, Political Participation, and Appetite for Reform: Americans' Assessment of the Role of Money in Politics*, 11 Election L. J. 380 (2012)	21

TABLE OF AUTHORITIES—Continued

Page

Bureau of Labor Statistics, National Occupational Employment & Wage Estimates United States, May 2012, *available at* http://www.bls.gov/oes/current/oes_nat.htm 10

Center for Responsive Politics, *available at* http://www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012 11

FEC Two-Year Summary, Total Contributions for the DNC, DSCC, DCCC, RNC, NRSC, NRCC, Barack Obama, and Mitt Romney, *available at* http://www.fec.gov/finance/disclosure/candcmte_info.shtml 13

Jason Cohen, *The Same Side of Two Coins: The Peculiar Phenomenon of Bet-Hedging in Campaign Finance*, 26 N. Ill. U. L. Rev. 271 (2006) 7

Jesse Bricker, et al., *Changes in Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, Federal Reserve Bulletin, Vol. 98, No. 2, June 2012, *available at* http://www.federalreserve.gov/pubs/bulletin/2012/pdf/scf12.pdf 9

Kevin Bogardus, *Lobbyists Fear Shakedown if Supreme Court Lifts Campaign Contributions Cap*, The Hill, Feb. 26, 2013, *available at* http://thehill.com/business-a-lobbying/284817-lobbyists-fear-shakedown-if-court-lifts-campaign-cap 22

TABLE OF AUTHORITIES—Continued

Page

NEA 2011-2012 Average Starting Teacher Salaries by State, *available at* http://www.nea.org/home/2011-2012-average-starting-teacher-salary.html 10

U.S. Census Bureau, Selected Economic Characteristics: 2011 American Community Survey 1-Year Estimates, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_DP03&prodType=table 10

INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is submitted, with the consent of the parties,[1] on behalf of the National Education Association (NEA); American Federation of Labor-Congress of Industrial Organizations (AFL-CIO); Service Employees International Union (SEIU); and American Federation of State, County, and Municipal Employees (AFSCME).

NEA is a nationwide employee organization with approximately three million members, the vast majority of whom are educators and education support professionals in our nation's public schools, colleges, and universities. AFL-CIO is a federation of 56 national and international labor organizations with a total membership of approximately 12 million working men and women. SEIU is one of the largest unions in North America; it represents over 2.1 million workers in service industries throughout the United States and Canada. AFSCME is a labor organization with 1.6 million members in hundreds of occupations who provide vital public services in 46 states, the District of Columbia, and Puerto Rico.

NEA, AFL-CIO, SEIU, AFSCME, and the millions of workers they represent have a substantial interest in the outcome of this litigation because they are deeply concerned with ensuring a system of fair elections and clean government. Furthermore, NEA, AFL-CIO, SEIU, and AFSCME all sponsor federal political

---

[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of the brief.

action committees (PACs) that receive individual contributions subject to the aggregate limits at issue in this case. That being the case, *amici* have developed substantial expertise with the applicable laws and constitutional principles.

SUMMARY OF ARGUMENT

Understanding that the integrity of our system of representative democracy is paramount, Congress has sought to combat both actual and perceived corruption of federal candidates and officeholders by placing limits on campaign contributions in federal elections, including limits on the aggregate amounts individuals may give over the course of an election cycle. This Court has properly deferred to Congress when it acts in this capacity, upholding contributions limits so long as they allow candidates and parties to amass sufficient funds for effective electoral advocacy.

The Appellants now invite this Court to abandon that deferential approach and apply an unreasonably demanding level of scrutiny that, on Appellants' view, results in the demise of the current—or any future—aggregate contribution limits. This Court should decline the Appellants' invitation, adhere to its existing precedent, and uphold the current aggregate limits.

Aggregate contribution limits impose only a marginal constraint on an individual's First Amendment rights. They do not meaningfully interfere with an individual's ability to express symbolic support for candidates or parties by making contributions. Nor do they restrain individuals in their ability to associate with candidates or parties, as individuals may

join parties or personally volunteer their services for candidates. That being the case, aggregate limits are subject to a deferential standard of review and survive as long as they are closely drawn to serve an important government purpose.

The existing federal aggregate limits easily satisfy this standard. The current limits—$48,600 to federal candidates and $74,600 to non-candidate committees and party committees, for a total of $123,200 each two-year election cycle—are so generous that they cannot be construed as significantly interfering with any expressive or associational rights that are implicated by contributions to a range of different candidates, parties, or committees. The large amount of money involved, the fact that the limits are indexed to inflation, and the small number of donors who even now approach the aggregate limits in a given election cycle all help to demonstrate that they do not impose a particularly restrictive condition on speech or association.

Finally, the aggregate limits are justified by the compelling interest in combatting both the reality and appearance of corruption arising from large campaign contributions. In the absence of an aggregate limit, the base limits on direct contributions to a given candidate could be easily circumvented. Likewise, the aggregate limits prevent the appearance of corruption that may arise when candidates and officeholders exert pressure on contributors with the implied threat to withdraw access if the contributors fail to deliver. Without prophylactic protections against the reality and appearance of corruption, voters could well decide that "the fix is in," which in turn would jeopardize their willingness to

take part in the democratic process on which our system of governance rests.

ARGUMENT

At the urging of the American public, Congress has long been concerned with, and sought to mitigate, the "pernicious influence of large campaign contributions." *McConnell v. FEC*, 540 U.S. 93, 115-19 (2003) (discussing the development of campaign finance laws), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). To that end, the Federal Election Campaign Act of 1971 (FECA), as amended, imposes limits on individuals' political contributions—both on what can be given to a single candidate, party committee, or PAC and on what can be given in aggregate. This case presents a constitutional challenge to the aggregate limits on contributions, a version of which this Court upheld in *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976) (per curiam).

These limits are a straightforward means of addressing the "threat from politicians too compliant with the wishes of large contributors" and combatting "the cynical"—but frequently justified—"assumption that large donors call the tune." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389-90 (2000). The means that Congress chose in service of this goal are modest: placing biennial aggregate contribution limits alongside the per-recipient (or "base") limits on contributions to candidates, political parties, and PACs, and doing so at amounts so high that few Americans could even imagine exceeding them.

As we will show, the Appellants' quest to strike

down FECA's aggregate limits must fail. Because these contribution limits impose only a marginal constraint on an individual's First Amendment rights, they are subject to a deferential standard of review. Moreover, the aggregate limits satisfy this standard because they do not significantly interfere with the symbolic expression or associational interests implicated by contributions to different candidates, parties, or PACs. Finally, the aggregate limits are justified by the compelling interest in combatting both the reality and appearance of a "sense of obligation" arising from large campaign contributions. *McConnell*, 540 U.S. at 144.

A. Aggregate Contribution Limits Must Be Reviewed Deferentially Under "Closely Drawn" Scrutiny

Ever since this Court's seminal decision in *Buckley*, a key distinction has animated the First Amendment analysis of all campaign-finance regulations. That distinction is between *expenditures*, on the one hand, that directly fund campaign-related speech and *contributions*, on the other hand, that simply fund the expression of others. As the *Buckley* Court explained, expenditure limits "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech," while contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 19, 20. Accordingly, this Court has held that an expenditure limit is subject to "strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United*, 558 U.S. at 340 (citations and quota-

tion marks omitted). But a contribution limit—even one "involving [a] significant interference with associational rights"—"is nevertheless valid if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136 (citations and quotation marks omitted).

Faced with this precedent—including *Buckley*'s explicit rejection of a First Amendment challenge to FECA's then-existing aggregate limits—the Appellants and their supporting *amici* have called for this Court either to overrule *Buckley*, eliminate the distinction between contributions and expenditures, and apply strict scrutiny to both; or to apply to contribution restrictions a version of "closely drawn" scrutiny that is for all practical purposes indistinguishable from strict scrutiny. This Court should reject both of those entreaties. The distinction between contributions and expenditures is both conceptually sound and constitutionally significant, and this Court should continue to adhere to it, as it did when analyzing the aggregate limits in *Buckley*.

The rationale for less rigorous scrutiny is in fact at its strongest as it applies to aggregate limits because—even more than base limits on individual contributions to particular candidates, parties, or committees—they "le[ave] communication significantly unimpaired." *Shrink Missouri*, 528 U.S. at 378. After all, contributions to a particular candidate implicate the First Amendment because they at least serve "as a general expression of support for the candidate and his views," albeit without "communicat[ing] the underlying basis for the support." *Buckley*, 424 U.S. at 21; *see also Shrink Missouri*,

528 U.S. at 386 ("The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated symbolic act of contributing."). The communicative value of such contributions "inheres . . . in their ability to facilitate the speech of their recipients," which is why this Court has held that contribution limits will impose an undue burdens on free speech "if they are so low as to preven[t] candidates and political committees from amassing the resources necessary for effective advocacy." *McConnell*, 540 U.S. at 135 (alteration in original, citation and quotation marks omitted).

Yet, so long as the underlying base contributions limits satisfy this standard (something the Appellants do not dispute), an aggregate limit generally will *not* impose additional burdens of any consequence on First Amendment expression or association. First, any burden on the expressive content of multiple campaign contributions is quite limited. Campaign contributors may decide to support multiple candidates for myriad reasons or may even contribute to competing candidates in an election.[2] The mere fact that an individual might seek to make multiple contributions beyond the limits set in the law does not raise a genuine First Amendment concern. Indeed, compared to a contribution to a single candidate, party, or PAC—which at least has the virtue of giving a "very rough index of the intensity of the contributor's support," *Buckley*, 424 U.S. at 21—the communicative value inherent in

---

[2] *See, e.g.*, Jason Cohen, *The Same Side of Two Coins: The Peculiar Phenomenon of Bet-Hedging in Campaign Finance*, 26 N. Ill. U. L. Rev. 271, 288-89 (2006).

a combination of many contributions is far more generic, diffuse, and undifferentiated.

Second, as long as individuals can contribute at least some meaningful amount to all of their desired candidates and parties, and those entities can in turn amass adequate resources for effective advocacy, the aggregate limits impose no additional burden on the contributor's associational freedoms. The limits leave an individual "free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates, and allow associations to aggregate large sums of money to promote effective advocacy." *McConnell*, 540 U.S. at 136 (citations and quotation marks omitted). Thus, the "overall effect" of the aggregate limits—particularly when paired with the base limits—is "merely to require candidates and political committees to raise funds from a greater number of persons." *Id.* (citations and quotation marks omitted).

These observations generally would hold true for *any* aggregate limit that allows a wide array of contributions to be made within a set of base contribution limits. But they have particularly strong application to FECA's aggregate limits being challenged here. As we will show, the current limits are so generous that they cannot be construed as significantly interfering with any expressive or associational rights. Moreover, these limits are justified by the compelling need to protect the integrity of the election process.

B. FECA's Aggregate Limits Do Not Significantly Interfere with Expressive or Associational Rights

The base and aggregate limits work in tandem to

prevent one individual from giving large amounts of money that would have a potentially corrupting influence on a candidate or party. The current aggregate limits, which are adjusted for inflation, allow individual contributors to give up to $48,600 to federal candidates, and to give up to $74,600 to non-candidate PACs and party committees, for a total of $123,200 each two-year election cycle. These limits are high enough that they do not involve a "significant interference" with expressive or associational rights. *Shrink Missouri*, 528 U.S. at 387 (citation and quotation marks omitted).

The overall $123,200 limit allows ample opportunities for contributions to any number of candidates, while mitigating the risk that a large donor will be able to buy improper influence, or the public will perceive democracy to be undermined by the improper influence of large donors. To put the aggregate limit in context, it far exceeds the entire net worth of well over half of American families (not just individuals), who in any event have much of their wealth invested in illiquid assets like housing.[3] By like token, the limit is approximately equal to what someone would earn if they worked at the minimum wage for every single

---

[3] In 2010, the median net worth of American families was approximately $77,300. *See* Jesse Bricker, et al., *Changes in Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, Federal Reserve Bulletin, Vol. 98, No. 2 at 16-25, June 2012, *available at* http://www.federalreserve.gov/pubs/bulletin/2012/pdf/scf12.pdf. The mean net worth of American families in 2010 was approximately $498,800, a figure strongly skewed by the massive accumulation of assets at the upper reaches of the wealth scale. *Id.*

hour and day of an election cycle. More specifically, a worker earning the federal minimum wage of $7.25 per hour, *see* 29 U.S.C. § 206(a)(1)(C), would need to work more than 23 and a quarter hours per day every day for the entire two-year election cycle to earn an amount equal to the aggregate contribution limit.

Viewed through yet another lens, the aggregate limit is more than 4.6 times the per capita income in the United States; over the two-year election cycle, an individual paid this amount would earn less than 44 percent of the aggregate limit.[4] The cap is nearly double the $67,930 average annual salary of a registered nurse,[5] nearly three-and-a-half times the $35,672 average starting salary of a teacher,[6] and nearly five times the $24,850 average annual salary of a janitor.[7] An entire U.S. household pooling its resources is unlikely to earn as much of the aggregate cap over two years. The cap is more than 2.4

---

[4] According to U.S. Census Bureau data, the per capita income in the United States was $26,708 in 2011. *See* U.S. Census Bureau, Selected Economic Characteristics: 2011 American Community Survey 1-Year Estimates, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_DP03&prodType=table.

[5] *See* Bureau of Labor Statistics, National Occupational Employment & Wage Estimates United States, May 2012, *available at* http://www.bls.gov/oes/current/oes_nat.htm.

[6] *See* NEA 2011-2012 Average Starting Teacher Salaries by State, *available at* http://www.nea.org/home/2011-2012-average-starting-teacher-salary.html.

[7] *See* National Occupational Employment & Wage Estimates, *supra* note 5.

times the median annual household income in the United States; over the two-year election cycle the median household earns approximately 80 percent of the aggregate limit.[8] And, all of this, of course, does not take into account living expenses and taxes that greatly reduce the amount of money individuals have available to contribute to political campaigns.

Given that so few Americans can give this amount of money, it is not surprising only a tiny fraction of the populace—only 1,877 individuals, or approximately 0.0006 percent of the population—came within even $22,000 of contributing the combined $117,000 aggregate limit that applied during the 2011-2012 election cycle.[9] To be sure, the First Amendment does not permit laws that violate even one person's constitutional rights, but the salient point is that the small number of donors who even approached the aggregate limit helps to demonstrate that it is not a particularly restrictive condition. On the contrary, it is a huge amount of money, more than most Americans could ever dream of donating to political campaigns.

Moreover, the generous aggregate limits leave an individual free to associate with as many candidates and political committees as she wishes. Appellant McCutcheon argues that the aggregate limitations are "far more invasive than base contribution limits"

---

[8] According to U.S. Census Bureau data, the national median for household income in 2011 was $50,502. *See supra*, note 4.

[9] According to the Center for Responsive Politics, only 1,877 individuals gave more than $95,000 during the election cycle (the largest category of data provided). *See* http://www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012.

because they "operate to prevent an individual from associating with, expressing support for, and assisting 'too many' candidates, political party committees, or PACs in a single election." *See* McCutcheon Br. at 17. This is untrue.

First, under the aggregate limit, an individual is free to donate a meaningful amount to a candidate in *every single* federal election each cycle. The current $48,600 aggregate contribution limit to candidates allows an individual contributor to give more than $100 to a candidate in every single federal election each cycle.[10] On top of this, contributors can give $74,600 to party committees and PACs that will assist these candidates. Furthermore, "[n]othing in [the challenged cap] limits the amount [McCutcheon] may independently expend in order to advocate political views; rather, the statute restrains only the amount that [he] may contribute." *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 195 (1981). McCutcheon may spend independently without limit to promote his favored candidates, donate unlimited money to so-called "Super PACs" for independent expenditures, and fundraise and volunteer other services to campaigns.

Second, the aggregate limits fully enable an indi-

---

[10] The 2014 elections will include 435 House races and 33 regular Senate elections. Additionally, there are expected to be four special elections in 2013 and 2014, for seats left vacant by the resignations of Senators John Kerry and Jim DeMint and the deaths of Senators Daniel Inouye and Frank Lautenberg, for a total of 472 federal elections. An individual could donate approximately $103 to a candidate in each and every one of these 472 federal races.

vidual to imbue contributions with a symbolic dimension that this Court has identified as both a practical and constitutionally significant feature of individual contributions. *See Shrink Missouri*, 528 U.S. at 386. For example, McCutcheon has made a series of contributions of $1,776 because he finds that particular number "especially meaningful." McCutcheon Br. at 30. Under the current biennial aggregate limit of $48,600 to candidates, he could make as many as 2,736 contributions of 1,776¢. In other words, he could make contributions in an amount that has the same symbolic and numerological significance to far more candidates than there are major-party federal nominees in any election (and likely more than there are even candidates for such nominations).

Third, with respect to their effects on candidates, party committees, and PACs, the aggregate limits leave them "ample opportunities for soliciting federal funds on behalf of entities subject to FECA's source and amount restrictions." *McConnell*, 540 U.S. at 139. *Cf. Buckley*, 424 U.S. at 21 (observing that contribution limits may not be closely drawn "if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy."). During the 2012 election cycle, the six national party committees and the two major party presidential candidates raised nearly $1.7 billion in individual contributions.[11] This is in addition to billions more contributed to 468 Senate

---

[11] *See* FEC Two-Year Summary, Total Contributions for the DNC, DSCC, DCCC, RNC, NRSC, NRCC, Barack Obama, and Mitt Romney, *available at* http://www.fec.gov/finance/ disclosure/candcmte_info.shtml.

and House candidates, 50 state party committees, and thousands of PACs, not to mention independent expenditures on behalf of the candidates. The billions of dollars contributed make clear that the aggregate contribution limits impose only at most minor hardship on candidate, party committee, and PAC fundraising.

The Constitution does not require that an individual be allowed to spend virtually unlimited sums of money for the "undifferentiated symbolic act of contributing" to political campaigns. *Shrink Missouri*, 528 U.S. at 386. On the contrary, the existing aggregate limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication," *Buckley*, 424 U.S. at 21, and should therefore be upheld upon the government's showing of a sufficiently important interest.

C. FECA's Aggregate Contribution Limits Serve an Essential Function of Combating Corruption and the Public Perception of Corruption

FECA's aggregate contribution limits easily meet the test of serving a "sufficiently important" government interest. As this Court has recognized since the earliest days of campaign finance regulation, contributions to candidates for federal office as well as contributions to political parties and PACs, pose a risk of *quid pro quo* corruption or the appearance of such corruption. *See Buckley*, 424 U.S. at 28 (observing that the "reality or appearance of corruption [is] inherent in a system permitting unlimited financial contributions."); *see also Citizens United*, 558 U.S. at 359 (noting that "contribution limits . . . have been an accepted means to prevent *quid pro quo* corrup-

tion"); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-41 (2001) ("*Colorado II*") (observing that "limits on contributions are more clearly justified by a link to political corruption than limits on other kinds of unlimited political spending are"). The aggregate contribution limits are justified today, just as they were when *Buckley* was decided, by the interest in preventing corruption and the appearance of corruption.

1. The aggregate limits address the real and serious threat of corruption. The Appellants reason that the existing base limits represent a threshold below which there is no cognizable danger or corruption and, extrapolating from that, claim that numerous contributions at or below that limit to different candidates, parties, and committees likewise create no danger of corruption. *See* McCutcheon Br. at 37-38, 44-51; RNC Br. at 36 ("Doing something posing zero *cognizable* risk multiple times does not increase the risk.") (emphasis in original). Appellants further contend that prohibitions against earmarking, one individual controlling multiple PACs, base contribution limits on PAC and party committee giving, and limits on coordination prevent circumvention of base contribution limits, making aggregate limits unnecessary. *See* McCutcheon Br. at 39-51; RNC Br. at 16-24, 39-42.

This reasoning is flawed in every particular. First, the fact that Congress has chosen particular base limitations does not mean that they pose *no* risk of corruption. Rather, Congress chose base limitations to guard against corruption in a way that only minimally restricts expression and association. The fact

that it chose a particular maximum for candidate contributions does not preclude supplemental efforts to prevent corruption or the appearance of it. As the *Buckley* Court observed, if the Court "is satisfied that some limit on contributions is necessary, a court has no scalpel to probe" the specific limit Congress chose. 424 U.S. at 30.

Second, Appellants presume that only a large donation *directly* to one candidate can have a corruptive effect. While this argument might be plausible if each candidate operated truly independently and circumvention were easily detectable, the reality is that this country's electoral process is nearly completely dominated by two political parties that each operate as a team. "What a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit." *Colorado II*, 533 U.S. at 458. Often, this is accomplished at the solicitation of a single candidate and one payment from the contributors. FEC rules allow "joint fundraising committees" to accept one check for as many candidates and committees as are part of the joint fundraising operation. 11 C.F.R. § 102.17. Although joint fundraising committees must initially allocate contributions amongst the participants, *id.* at § 102.17(c)(1), national or state party committees are free to transfer unlimited amounts among themselves, *id.* §§ 102.6(a)(1)(ii), 113.2(c), candidates are then free to transfer unlimited amounts to party committees, and party committees may also assist candidates by making coordinated expenditures that may greatly exceed the contribution limits that apply to other donors, 2 U.S.C. § 441a(d).

Notwithstanding Appellant RNC's insistence that the national party committees are "separate legal entities, with separate histories . . . [and] their own agendas," RNC Br. at 33, in fact the parties' fundraising and fortunes are extensively interconnected, and a gift to one candidate, party committee, or PAC may be viewed and may function as a gift to other party members. Because of this, Congress determined that aggregate limits are necessary to ensure that political parties and their leadership are not beholden to large contributors. Otherwise, base contributions without aggregate contributions would be largely meaningless. Aggregate limits act as "a corollary of the basic individual contribution limitation," preventing their circumvention. *Buckley*, 424 U.S. at 38.

In upholding the aggregate contribution limits, the *Buckley* Court observed that the base limits could easily be circumvented "through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38. As the Court later explained in upholding the ban on "soft money" contributions to national parties:

> The idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible. For nearly 30 years, FECA has placed strict dollar limits and source restrictions on contributions that individuals and other entities can give to national, state, and local party committees for the purpose of influencing a federal election. The premise behind these restrictions has been, and continues

> to be, that contributions to a federal candidate's party in aid of that candidate's campaign threaten to create—no less than would a direct contribution to the candidate—a sense of obligation. This is particularly true of contributions to national parties, with which federal candidates and officeholders enjoy a special relationship and unity of interest.

McConnell, 540 U.S. at 144 (internal citation and quotation marks omitted); *see also id.* at 151 (discussing the special access to discuss legislative matters that parties provide to large donors); *Colorado II*, 533 U.S. at 452 ("Parties thus perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders.").

This Court likewise has already addressed the argument that earmarking prohibitions render protections against circumvention unnecessary. In *Colorado II*, a state political party challenging coordinated spending limits argued that circumvention was not a concern because of the earmarking prohibition. As the Court explained, "This position, however, ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions" where "circumvention is obviously very hard to trace." 533 U.S. at 462. "The earmarking provision . . . would reach only the most clumsy attempts to pass contributions through to candidates. To treat the earmarking provision as the outer limit of acceptable tailoring would disarm any serious effort to limit" circumvention. *Id.* Appellants provide no facts or argument to warrant the Court's reconsideration of that conclusion.

"Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced" by invalidating aggregate contribution limits. *Colorado II*, 533 U.S. at 457. The aggregate limits fill obvious cracks in the system, and the hypothesis that money otherwise would flow through these cracks is not merely plausible but certain. There is more than enough evidence for the Court to affirm on this ground. *See Shrink Missouri*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

2. The aggregate limits also combat the public perception of corruption that comes from massive campaign contributions. *See Buckley*, 424 U.S. at 27 (observing that the "impact of the appearance of corruption" is "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements"). Corruption is notoriously difficult to prove, as corrupt contributors and politicians may avoid directly acknowledging what they are doing, and elected officials' legislative actions enjoy constitutional protection. *See id.* at 27-28 (noting that "laws making criminal the giving and taking of bribes deal with only the most blatant and

specific attempts of those with money to influence governmental action."). Contribution limits therefore serve a "preventative" function and "ensure against the reality or appearance of corruption." *Citizens United*, 558 U.S. at 357 (internal citation omitted). Even if the vast majority of politicians resist the temptation to repay large contributors with improper favors, "Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Buckley*, 424 U.S. at 30.

Preventing public perception of corruption is critical because representative democracy is premised on the representation of voters, not moneyed interests. If voters believe politicians serve donors' interests over the public interest, our democracy is fundamentally undermined. The *Buckley* Court held that "Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* (citation, quotation marks, and ellipses removed). "Take away Congress' authority to regulate the appearance of undue influence and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *McConnell*, 540 U.S. at 144 (quoting *Shrink Missouri*, 528 U.S. at 390; internal quotation marks omitted).

Survey research demonstrates that Americans per-

ceive a threat of corruption. For example, in a survey of more than 2,000 people, 70 percent of respondents said that politicians vote to please their campaign contributors either "all the time" or "often," while only 18 percent said they did so "sometimes" or "never." Abby Blass, Brian Roberts, Daron Shaw, *Corruption, Political Participation, and Appetite for Reform: Americans' Assessment of the Role of Money in Politics*, 11 Election L. J. 380, 385-86 (2012). Similarly, when asked to rate who their elected officials listen to and who has power in Washington, DC, "campaign contributors" received the highest score, while a "member's constituency preferences" received the lowest. *Id.* at 386. Thus, sizeable majorities believe that currently permissible large contributions have a corrupting influence on public officials, and that perception would likely increase if aggregate limits were removed and wealthy donors could contribute millions of dollars each election cycle.

Contributors themselves may perceive large contributions as the purchase price for political favors. As this Court has recognized, lobbyists, corporate executives, and wealthy individuals often contribute large amounts to political campaigns for the express purpose of buying influence. *McConnell*, 540 U.S. at 124-25, 147. If, on the other hand, they choose not to give, "[b]usiness and labor leaders believe, based on their experience, that disappointed Members, and their party colleagues, may shun or disfavor them because they have not contributed." *Id.* at 125 n.13. Politicians in turn look to lobbyists for large contributions, and, absent the aggregate caps, lobbyists

will be pressured to give even more.[12] It certainly "was not unwarranted for Congress to conclude that the selling of access gives rise to the appearance of corruption." *Id.* at 154.

Congress reasonably concluded that absent the aggregate limits, the size and frequency of these contributions inevitably would increase and would lead to more such stories arousing suspicions of corruption. This Court should uphold Congress' long-recognized power to mitigate the corrosive effects of large donations on democratic processes though modest aggregate contribution limits.

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

---

[12] Kevin Bogardus, *Lobbyists Fear Shakedown if Supreme Court Lifts Campaign Contributions Cap*, The Hill, Feb. 26, 2013, *available at* http://thehill.com/business-a-lobbying/284817-lobbyists-fear-shakedown-if-court-lifts-campaign-cap ("'I like the limit because it gives me an excuse not to give more,' said one Republican lobbyist. 'If there was no limit, I would give more.'").

Respectfully submitted,

ALICE O'BRIEN
(Counsel of Record)
JASON WALTA
LISA POWELL
NICHOLAS MUELLER
National Education Association
1201 16th Street, N.W.
Washington, DC 20036
(202) 822-7035

WILLIAM LURYE
JESSICA ROBINSON
American Federation of State,
County and Municipal Employees
1625 L Street, N.W.
Washington, DC 20036
(202) 429-1293

JUDITH A. SCOTT
MARK SCHNEIDER
Service Employees
International Union
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 730-7000

LYNN K. RHINEHART
CRAIG BECKER
LAURENCE E. GOLD
American Federation of
Labor-Congress of Industrial
Organizations
815 16th Street, N.W.
Washington, DC 20036
(202) 637-5310

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 12-536

Supreme Court, U.S.
FILED
MAY 10 2013
OFFICE OF THE CLERK

In The Supreme Court of the United States

SHAUN MCCUTCHEON
AND
REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF THE NATIONAL REPUBLICAN SENATORIAL COMMITTEE AND NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE SUPPORTING PLAINTIFFS-APPELLANTS

Jessica Furst Johnson
General Counsel
National Republican
Congressional Committee
310 First Street, SE
Washington, DC 20003

Megan L. Sowards
General Counsel
National Republican
Senatorial Committee
425 Second Street, NE
Washington, DC 20002

Jason Torchinsky
Counsel of Record
Thomas J. Josefiak
J. Michael Bayes
Holtzman Vogel Josefiak PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186
(540) 341-8808
(540) 341-8809
jtorchinsky@hvjlaw.com
Counsel for Amici Curiae

May 10, 2013

Library of Congress
Law Library

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

CORPORATE DISCLOSURE x

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE AGGREGATE LIMITS ON CONTRIBUTIONS TO NATIONAL PARTY COMMITTEES IMPOSE A SEVERE AND UNCONSITUTIONAL BURDEN 5

A. Taken Together, The Base Limits And Aggregate Limits Operate In A Manner That Unconstitutionally Infringes The First Amendment Rights Of Candidates, Political Parties, And Donors 6

B. The Aggregate Limits Do Not Satisfy Or Serve Any Anti-Corruption Interest, And Serve Only An Anti-Circumvention Interest Already Comprehensively Met By Other Prohibitions And Restrictions 9

1. This Court has never held that aggregate limits serve any anti-corruption purpose unrelated to preventing circumvention..... 9

2. The 1976 Amendments to FECA included comprehensive anti-circumvention protections that addressed the *Buckley* Court's concerns regarding earmarking without attribution and political committee affiliation and proliferation..... 11

3. Reviewing *Buckley* in light of the 1976 Amendments to FECA demonstrates no continuing constitutional justification for upholding the aggregate limits 12

II. A NATIONAL PARTY COMMITTEE'S RELATIONSHIP WITH ITS CANDIDATES IS NOT SHAPED BY THE AGGREGATE LIMITS, AND OTHER PROVISIONS OF FECA GOVERN THE DIRECT INTERACTIONS OF PARTIES AND CANDIDATES..... 19

A. A National Party Committee Is Limited In The Amount It May Contribute To A Candidate By A Direct Contribution Limit, Not By The Aggregate Limits 21

B. A National Party Committee Is Limited In The Amount It May Spend In Coordination With A Candidate By A Direct Limit On Party Coordinated Expenditures, And Not By The Aggregate Limits 23

C. Candidates May Not Contribute Funds To Other Candidates Without Limitation, And Candidate-To-Candidate Contributions Generally Originate From Small Numbers Of Officeholders 28

III. JOINT FUNDRAISING COMMITTEES ARE NOT A MEANS OF CIRCUMVENTING CONTRIBUTION LIMITS 30

A. A Joint Fundraising Committee Is A Highly Regulated Method Of Fundraising That Permits A Donor To Efficiently Contribute To Multiple Political Committees Simultaneously 32

B. **Joint Fundraising Committees Have Existed Since The Origin Of FECA, And Have Consistently And Historically Collected Contributions Up To The Applicable Limit For Each Participating Committee..... 36**

CONCLUSION 39

TABLE OF AUTHORITIES

Page

CASES

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. ____, 131 S. Ct. 2806 (2011).... 15, 19

Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002)... 15

Associated Press v. U.S., 326 U.S. 1 (1945) 9

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) 15

Bartnicki v. Vopper, 532 U.S. 514 (2001) 15

Buckley v. Valeo, 424 U.S. 1 (1976).....*passim*

Cal. Med. Ass'n v. FEC, 453 U.S. 182 (1981)..... 10

Citizens United v. FEC, 558 U.S. 310 (2010). 15, 19, 28

Davis v. FEC, 554 U.S. 724 (2008)..... 15, 19

Democratic Senatorial Campaign Comm. v. FEC, 139 F.3d 951 (D.C. Cir. 1998)..... 2

FEC v. Colo. Republican Fed. Campaign Comm. (*Colorado II*), 533 U.S. 431 (2001) 2, 9, 25

FEC v. National Republican Senatorial Comm., 966 F.2d 1471 (D.C. Cir. 1992)..... 2

FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) . 15

McCutcheon v. FEC, 893 F. Supp. 2d 133 (D.D.C. 2012).....*passim*

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (U.S. 2000)..... 39

N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)..... 9

Roth v. U.S., 354 U.S. 476 (1957) 9

STATUTES

2 U.S.C. § 431(14) 5

2 U.S.C. § 439a(a)(4)..... 28

2 U.S.C. § 441a(a)(1)(B)..... 7

2 U.S.C. § 441a(a)(2)(A)..... 21

2 U.S.C. § 441a(a)(3)(B)..... 7

2 U.S.C. § 441a(a)(4)..... 28

2 U.S.C. § 441a(a)(5)..... 12, 28

2 U.S.C. § 441a(a)(8)..... 12, 29

2 U.S.C. § 441a(d)(3)(A), (B)..... 24

2 U.S.C. § 441a(h)..... 21

2 U.S.C. § 441f 13

2 U.S.C. § 441i(a)(1)..... 6

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) 6

Federal Election Campaign Act, Amendments of 1976, Pub. L .No. 94-283, 90 Stat. 475 (1976) 6, 11

ADMINISTRATIVE REGULATIONS

11 C.F.R. § 100.5(g)(1) 28

11 C.F.R. § 102.17 33

11 C.F.R. § 102.17(a)(1) 34

11 C.F.R. § 102.17(c)(1) 34

11 C.F.R. § 102.17(c)(2) 34

11 C.F.R. § 102.17(c)(4) 34

11 C.F.R. § 102.17(c)(4)(i) 35

11 C.F.R. § 102.17(c)(6)(i) 35

11 C.F.R. § 102.17(c)(8)(i) – (ii) 35

11 C.F.R. § 109.33 24

11 C.F.R. § 110.3(a)(1) 12

ADMINISTRATIVE OPINIONS, RULEMAKINGS, AND NOTICES

FEC Advisory Opinion 1977-08 36

FEC Advisory Opinion 1977-14 36

FEC Advisory Opinion 1977-23 36

FEC Advisory Opinion 1977-61 36

FEC Advisory Opinion 1979-35 36

FEC Advisory Opinion 1986-31 24

FEC Notice of Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013) 7, 25

FEC Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 77 Fed. Reg. 9925 (Feb. 21, 2012) 26, 27

FEC Transmittal of Regulations to Congress on Transfer of Funds; Collecting Agents, Joint Fundraising, 48 Fed. Reg. 26,296, 26,298 (June 7, 1983) 33

OTHER AUTHORITIES

Campaign Legal Center Press Release, Reform Groups Urge Congress to Close Gaping Disclosure Loopholes (May 2, 2013), http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=2110:may-2-2013-reform-groups-urge-congress-to-close-gaping-disclosure-loopholes&catid=63:legal-center-press-releases&Itemid=61 17

FEC Press Release, *FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle* (Apr. 19, 2013), http://fec.gov/press/press2013/20130419_2012-24m-Summary.shtml 18

FEC's Opp'n to Pl.'s Mot. for Prelim. Inj., *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (No. 12-cv-1034) 10, 16, 17

Alex Knott, *Politicians Create Record Number of Joint Fundraising Committees*, Roll Call (Sept. 17, 2010), http://www.rollcall.com/news/ -49934-1.html 37, 38

Mem. of Campaign Legal Ctr. and Democracy 21 As *Amici Curiae* in Opp'n to Pl.'s Mot. for a Prelim. Inj., *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (No. 12-cv-1034) ..... *passim*

Joseph Morton, *Kerrey, Dems Set Up Joint Fundraising Committee*, Omaha World-Herald (Apr. 11, 2012), http://www.omaha.com/article/20120410/ NEWS01/120419949/0 37

Al Shaw & Kim Barker, *PAC Track: What and Where Are the Super PACs Spending?: Top Contributors To Super PACs*, ProPublica (Dec. 7, 2012), http://projects.propublica.org/ pactrack/#contributions=all 19

CORPORATE DISCLOSURE

The National Republican Senatorial Committee and the National Republican Congressional Committee are both unincorporated associations, so no corporations are involved.

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are two national political party committees whose activities and methods of fundraising are directly impacted by the provisions of law at issue in this matter.

The National Republican Senatorial Committee ("NRSC") is the principal national political party committee focused on electing Republican candidates to the United States Senate. Members of the NRSC include all incumbent Republican Members of the United States Senate. The Chairman of the NRSC is elected every two years by the Republican Senate caucus, and members are appointed by the Senate Republican Conference Committee. The NRSC is registered with the Federal Election Commission ("FEC") as a "political committee," and is recognized by the FEC as a national political party committee.

The National Republican Congressional Committee ("NRCC") is the principal national political party committee focused on electing Republican candidates to the United States House of Representatives. Members of the NRCC include all incumbent Republican Members of the United States House of Representatives. The NRCC is governed by

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution toward its preparation or submission. Counsel for the parties received timely notice of the intent to file this brief and have consented to its filing.

a Chairman and an Executive Committee composed of Republican members of the U.S. House of Representatives. The NRCC is registered with the FEC as a "political committee," and is recognized by the FEC as a national political party committee.

Both *amici* have participated in numerous campaign finance cases in the course of their respective histories, and both are subject to regulation as national political party committees by the FEC.[2]

---

[2] *See, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (National Republican Congressional Committee as *amicus curiae*); *Democratic Senatorial Campaign Comm. v. FEC*, 139 F.3d 951 (D.C. Cir. 1998) (National Republican Senatorial Committee as *amicus curiae*); *FEC v. National Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992).

SUMMARY OF ARGUMENT

The individual aggregate biennial contribution limits (the "aggregate limits") should be held unconstitutional. Based on this Court's precedent, there is no cognizable governmental interest that adequately justifies the imposition of the aggregate limits on either donors or the political committees that operate subject to those limits. The aggregate limits challenged in this litigation impose a severe burden on political parties, candidates, and donors without constitutional justification. The aggregate limits were never intended to serve an independent anti-corruption interest, nor have they operated in such fashion. Rather, the original aggregate limit was implemented as an anti-circumvention mechanism before the Federal Election Campaign Act of 1971 was amended in response to *Buckley v. Valeo*. The aggregate limits cannot withstand constitutional scrutiny in light of these post-*Buckley* amendments, the subsequent adoption of significant revisions to the overall structure of the aggregate limits, and the prohibition on non-federal fundraising activities by national political party committees.

In this brief, *amici* also note for the Court that the legal nature of a candidate's relationship with the national party committees is not shaped or ultimately controlled by the aggregate limits. Specifically, the party coordinated expenditure limitations and direct contribution limits from national party committees to their candidates are the operational limitations that shape that relationship. Additionally, while much has been made of the possibility of using candidate-to-

candidate contributions as a means of circumventing the base contribution limits to candidates, these candidate-to-candidate contributions are actually strictly limited, and existing anti-circumvention provisions eliminate the possibility of using such contributions as a means of circumventing the base limits.

Finally, as organizations with significant experience in joint fundraising, *amici* bring to the Court's attention the highly regulated process of creating and operating a joint fundraising committee. The extensive operational requirements of a joint fundraising committee are outlined in Federal Election Commission regulations, private agreements between the parties, and public disclaimers, all of which make plain that the base contributions limits to candidates must be strictly observed by a joint fundraising committee.

These several considerations demonstrate that the aggregate limits at issue here are not constitutionally justified, and should be held to violate the First Amendment.

ARGUMENT

I. THE AGGREGATE LIMITS ON CONTRIBUTIONS TO NATIONAL PARTY COMMITTEES IMPOSE A SEVERE AND UNCONSTITUTIONAL BURDEN

The Federal Election Campaign Act of 1971, as amended, ("FECA") provides that "[t]he term 'national committee' means the organization which, by virtue of the bylaws of a political party, is responsible for the day-to-day operation of such political party at the national level, as determined by the [Federal Election] Commission." 2 U.S.C. § 431(14). The Republican and Democratic Parties each maintain three organizations that qualify as national party committees under FECA: the Republican National Committee ("RNC"); the Democratic National Committee ("DNC"); the National Republican Senatorial Committee ("NRSC"); the Democratic Senatorial Campaign Committee ("DSCC"); the National Republican Congressional Committee ("NRCC"); and the Democratic Congressional Campaign Committee ("DCCC").

Buckley v. Valeo, 424 U.S. 1, 38 (1976), upheld the original FECA's $25,000 aggregate federal funds contribution limit to all federal committees. This single aggregate limit had no application to non-federal (that is, state-regulated) funds, which national party committees later raised and spent. Following *Buckley*, Congress amended FECA to impose restrictions on earmarking contributions and include rules designed to prevent the proliferation of

affiliated committees, but nevertheless maintained the aggregate limit on federal funds contributions. *See* FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, 487-88 (1976). In 2002, the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 101-03 (2002) ("BCRA"), prohibited national party committees from raising and spending non-federal dollars altogether, and imposed the current aggregate limits.[3] After nearly a decade of operating under the aggregate limits, the impacted First Amendment rights of donors, candidates and political party committees are now squarely before this Court.

A. Taken Together, The Base Limits And Aggregate Limits Operate In A Manner That Unconstitutionally Infringes The First Amendment Rights Of Candidates, Political Parties, And Donors

During the 2013-2014 election cycle, an individual donor may contribute up to $32,400 per calendar year to a national party committee. 2

---

[3] Prior to the adoption of BCRA, all six national party committees of the Republican and Democratic parties regularly raised and spent non-federal dollars. Thus, while the base and aggregate limits restricted the amount of federal funds that the party committees could raise, they could still fund their non-federal activities with non-federal dollars that were not subject to the federal base and aggregate limits. Following BCRA's adoption, however, the national party committees were prohibited from raising or spending non-federal dollars for *any* activities, *see* 2 U.S.C. § 441i(a)(1), meaning that all party activities, whether federal or non-federal in nature, must be funded with strictly limited federal funds.

U.S.C. § 441a(a)(1)(B); Federal Election Commission Notice of Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 78 Fed. Reg. 8530, 8532 (Feb. 6, 2013) [hereinafter 2013 FEC Price Index Adjustments]. Under the base contribution limits, a party supporter *could* contribute a combined $97,200 per year to the three national committees of his or her preferred party or, conceivably, $194,400 to all six. The aggregate limits, however, prohibit this.

With the current aggregate limits in place, this same hypothetical party supporter is limited to contributing only $74,600 to *all* political party committees *and* political action committees (PACs) during the two-year, 2013-2014 election cycle. 2 U.S.C. § 441a(a)(3)(B); 2013 FEC Price Index Adjustments, 78 Fed. Reg. at 8532. If a donor wishes to support the national party committees to the fullest extent possible under the law, he or she must forego supporting *any* state party committees or PACs during the applicable two year period. The aggregate limits permit a donor to support one party's three national committees in equal amounts of approximately $24,866 per committee over two years, or approximately $12,433 per committee per year. A donor who wishes to support all three national party committees of either the Republican or Democratic Party, in roughly equal amounts, cannot come close to the allowable base limit as a result of the aggregate limits. Furthermore, as a result of this donor's support of the party's national committees, he or she is legally precluded from financially supporting any of the party's state committees, or any of the thousands of active independent PACs (excluding the so-called "Super

PACs" that make only independent expenditures, may not make contributions to candidates or parties, and which are funded by contributions that are not subject to either the base or aggregate limits).

The additional constraints that the aggregate limits place on a donor's ability to support the national party committees come at a serious cost. The three national committees serve very different functions. The NRSC, for instance, provides support and assistance to current and prospective Republican candidates for the U.S. Senate in areas of budget planning, election law compliance, fundraising, communications tools and messaging, research and strategy. The NRCC performs the same function for Republican candidates to the U.S. House of Representatives. The RNC serves yet a different function within the Republican Party – namely, it organizes the general management of the Republican Party, and promotes Republican candidates at all levels – including candidates for President, the U.S. House, the U.S. Senate, Governorships, and state legislatures. The RNC also expends considerable resources on voter registration and get-out-the-vote activities that benefit the Republican Party as a whole at the federal, state, and local levels. Thus, a donor is effectively forced to choose which of these vital aspects of the Party's operations to support. In addition, a donor who contributes to the three national party committees to the fullest extent possible under the aggregate limits may not contribute one penny to any of the 50 state party federal accounts, any of the local party committees that maintain federal accounts, or any of the independent federal PACs found throughout the nation. This result is generally inconsistent with the

notion that the First Amendment "was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assume unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *See Buckley*, 424 U.S. at 49 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1964) (quoting *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945), and *Roth v. U.S.*, 354 U.S. 476, 484 (1957))).

B. The Aggregate Limits Do Not Satisfy Or Serve Any Anti-Corruption Interest, And Serve Only An Anti-Circumvention Interest Already Comprehensively Met By Other Prohibitions And Restrictions

1. This Court has never held that aggregate limits serve any anti-corruption purpose unrelated to preventing circumvention

The litigants appear to dispute whether this Court has treated the aggregate limits as only an anti-circumvention device (as Plaintiffs-Appellants contend), or whether the Court has held that aggregate limits also serve an independent anti-corruption interest (as Defendant-Appellee contends). This Court's precedent supports Plaintiffs-Appellants' view. *See FEC v. Colo. Republican Fed. Campaign Comm.* (*Colorado II*), 533 U.S. 431, 461 (2001) (referring to "corruption by circumvention").

In *Buckley*, this Court upheld FECA's "overall $25,000 limitation on total contributions by an individual during any calendar year" as a means of preventing circumvention of the base limits on contributions to federal candidates. *Buckley*, 424 U.S. at 38. There is no suggestion in the Court's brief discussion of the aggregate limit that it served any anti-corruption purpose unrelated to the circumvention of "the basic individual contribution limitation." *Id.*

In an effort to cast the aggregate limits as broad anti-corruption devices that prevent corruption in their own right, both the FEC and supportive *amici* presented the District Court with a strained interpretation of this Court's holding in *California Medical Association v. FEC*, 453 U.S. 182 (1981). Both referred to language from Justice Marshall's opinion in *California Medical Association* which describes the aggregate limit as "serv[ing] the important governmental interests in preventing the corruption or appearance of corruption of the political process that might result if such contributions were not restrained." *Id.* at 195 (Marshall, J., plurality opinion), *quoted in* FEC's Opp'n to Pl.'s Mot. for Prelim. Inj. at 12-13, *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (No. 12-cv-1034); Mem. of Campaign Legal Ctr. and Democracy 21 as *Amici Curiae* in Opp'n to Pl.'s Mot. for a Prelim. Inj. at 15, *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (No. 12-cv-1034). Part III of Justice Marshall's opinion, from which the quoted language comes, was supported by only four Justices. Justice Blackmun joined Parts I, II, and IV of Justice Marshall's opinion, but did not join Part III. Thus, contrary to the representations

made to the District Court, a Supreme Court majority has never characterized the aggregate limit as an independent anti-corruption device in its own right.

2. The 1976 Amendments to FECA included comprehensive anti-circumvention protections that addressed the *Buckley* Court's concerns regarding earmarking without attribution and political committee affiliation and proliferation

The Court's reasoning in *Buckley* appears to rest on factors and possibilities that Congress subsequently considered and addressed. In response to *Buckley*, Congress adopted contribution limits for political parties and PACs, "anti-proliferation" provisions for political committees, earmarking disclosure requirements, and restrictions against contributing in the name of another – all designed to prevent circumvention of the base limits on contributions to candidates. *See* FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475, 487-88 (1976). Since the enactment of these amendments, no genuine anti-corruption or anti-circumvention interest has existed to support the aggregate limit, which Congress nevertheless retained.

FECA now provides that "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions *which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate*, shall be treated as

contributions from such person to such candidate." 2 U.S.C. § 441a(a)(8) (emphasis added). Existing law treats a contribution that is "in any way earmarked or otherwise directed through an intermediary or conduit" as a contribution from the original donor to the candidate that ultimately receives the "earmarked" or "directed" contribution. *Id.*

The political committees that the *Buckley* Court worried could funnel contributions to a particular candidate are political committees that today would be deemed "affiliated," either with that candidate, each other, or both, pursuant to 2 U.S.C. § 441a(a)(5). Section 441a(a)(5) provides that "all contributions made by political committees established or financed or maintained or controlled by any . . . person, or by any group of such persons, shall be considered to have been made by a single political committee . . . ." FEC regulations clarify that "all contributions made or received by more than one affiliated committee . . . shall be considered to be made or received by a single political committee." 11 C.F.R. § 110.3(a)(1). Accordingly, candidates and outside interest groups may no longer maintain the multiple political committees that the *Buckley* Court concluded could be used to circumvent the contribution limits to candidates.

3. Reviewing *Buckley* in light of the 1976 Amendments to FECA demonstrates no continuing constitutional justification for upholding the aggregate limits

The amended FECA does not allow an individual to "contribute massive amounts of money

to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Buckley*, 424 U.S. at 38. The possibility of circumvention that troubled the *Buckley* Court is now only possible if both a donor and political committee knowingly conspire to ignore and violate the anti-earmarking provisions of FECA, which would likely also yield a contribution in the name of another in violation of 2 U.S.C. § 441f. The "circumvention" this Court referenced in *Buckley* is best understood as the exploitation of a "loophole" in the law that permitted a donor to do indirectly what could not be done directly – namely, contribute more than $1,000 to a candidate simply by using political parties and/or political committees as intermediaries. A prophylactic measure was appropriate in those circumstances.

Now, however, the same act does not constitute exploiting a "loophole." Rather, that act is now treated as a knowing and willful violation of multiple provisions of the law. This behavior is no longer "circumvention" of the law's limitations, but rather, the outright disregard of the law by at least two involved parties. Under these changed circumstances, the aggregate limits do not serve the "anti-circumvention" purpose they once had.

Properly conceived and understood, the aggregate limits today serve two basic purposes, both of which are dubious: (1) to limit the possible extent to which a donor may knowingly violate other provisions of the law for the sake of making excessive contributions to candidates; and (2) to

prevent any one donor from contributing "too much" money to the political process. These purposes, of course, must be reconciled with the cognizable government interests that this Court has deemed sufficiently important to justify infringing the First Amendment rights of speech and association that citizens and organizations possess in this country.

In order to find the first purpose valid, the Court must conclude that redundant prophylactic measures are valid in the First Amendment context, and that the prophylaxis employed here actually serves its stated purpose (that is, it prevents circumvention of the candidate contribution limits). The 1976 Amendments to FECA rendered the aggregate limits superfluous and removed their constitutional justification. The aggregate limits do not directly or indirectly prevent any "circumvention" that is not already addressed and prevented by more precise and narrowly drawn provisions. An individual who wishes to circumvent the $2,600 per election limit on contributions to a federal candidate can do so only by conspiring with one or more political parties or PACs willing to serve as conduits in plain disregard of FECA's anti-earmarking provisions. The aggregate limits effectively place a $76,400 cap on the scope of this illegal conspiracy.

If this Court accepts the "prophylaxis upon prophylaxis" justification asserted by the government here, legislatures would be free to impose layer upon layer of regulation in a never-ending attempt to prevent people from knowingly violating the existing, core campaign finance laws. This Court has already rejected such legislation. *See*

FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 479 (2007) (rejecting "a prophylaxis-upon-prophylaxis approach to regulating expression"). Furthermore, these redundant layers of regulation infringe the rights of the overwhelming majority of law abiding citizens for the sake of, perhaps, limiting the illegal activity of a much smaller number of citizens – a proposition this Court has previously rejected. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) ("The Government may not suppress lawful speech as the means to suppress unlawful speech."); *Bartnicki v. Vopper*, 532 U.S. 514, 529-30 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it . . . . But it would be quite remarkable to hold that speech by a law-abiding [person] can be suppressed in order to deter conduct by a non-law-abiding third party.").

The second purpose noted above is an illegitimate "leveling the playing field" measure that cannot stand in light of this Court's recent precedent. *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. ____, 131 S. Ct. 2806, 2825 (2011) ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech."); *see also Citizens United v. FEC*, 558 U.S. 310, 349-56 (2010) (rejecting antidistortion rationale as valid governmental interest); *Davis v. FEC*, 554 U.S. 724, 741 (2008) (rejecting as legitimate governmental interest "level[ing] electoral opportunities"); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 705 (1990) (Kennedy, J., dissenting) ("the notion that the government has a legitimate interest in

restricting the quantity of speech to equalize the relative influence of speakers on elections is antithetical to the First Amendment"). Whereas the base limits may serve an anti-corruption interest by preventing a donor from "corrupting" a candidate by contributing more than $2,600 per election, the aggregate limits do not prevent a donor from corrupting any identifiable candidate, party, or PAC. Rather, the only anti-corruption interest the aggregate limits can possibly serve is the purported interest in preventing a donor from corrupting the "democratic system" or "political system" as a whole, under the theory that the *total* amount that any one donor may contribute to all federal candidates, parties, and PACs must be limited. *See, e.g.*, FEC's Opp'n at 21, *McCutcheon*, 893 F. Supp. 2d 133 (No. 12-cv-1034) (asserting that without the aggregate limits, the "amount of money" that an individual could contribute "per election cycle" "could easily exert a corrupting influence on the democratic system"); Mem. of Campaign Legal Ctr. and Democracy 21 at 18, *McCutcheon*, 893 F. Supp. 2d 133 (No. 12-cv-1034) (faulting plaintiffs for "disregard[ing] the collective impact that up to 468 of such 'limited' contributions from a single donor will potentially have on the political system"). The District Court was correct in concluding that this line of argument "simply sweeps too broadly" because "if anything is clear, it is that contributing a large amount of money does not ipso facto implicate the government's anticorruption interest." *McCutcheon*, 893 F. Supp. 2d at 139. Once the broad notion that the aggregate limits prevent corruption of the "democratic system" or "political system" as a whole is rejected, all that remains is the realization

that this argument is simply a "leveling the playing field" rationale.[4]

The government's discussion of "massive" contributions reinforces this conclusion. The FEC sought to alarm the District Court by noting that the aggregate limits prevent a donor from contributing a combined $3.5 million to 468 federal candidates and 56 party committees during a two-year election cycle. *See* FEC's Opp'n at 20, *McCutcheon*, 893 F. Supp. 2d 133 (No. 12-cv-1034). The FEC calls this amount "massive" and asserts that "prevention of such 'huge' contributions thus falls squarely within the government's anti-corruption and anti-circumvention interests." *Id.* at 20-21. The $3.5 million figure, however, is a red herring. In the absence of the aggregate limits, no one could contribute $3.5 million to any one candidate, political party, or PAC. Rather, $3.5 million is an *aggregate* figure that must be split among (at least) 524 committees, none of which could receive in

---

[4] In a May 2, 2013, open letter to Congress, *amici curiae* Campaign Legal Center and Democracy 21 made explicit that their support for the aggregate limits is premised on the constitutionally impermissible anti-distortion rationale. The letter urged Members of Congress not to raise or otherwise alter the aggregate limits, because "[t]he aggregate limit on individual giving is already far too high" and "[a]ny such increase or change would only serve to increase the access and influence of the wealthiest citizens in the country, at the expense of all other Americans." *See* Campaign Legal Center Press Release, *Reform Groups Urge Congress to Close Gaping Disclosure Loopholes* (May 2, 2013), http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=2110:may-2-2013-reform-groups-urge-congress-to-close-gaping-disclosure-loopholes&catid=63:legal-center-press-releases&Itemid=61.

excess of its applicable base limit. The FEC never explains how $3.5 million, widely dispersed among hundreds of recipients in amounts at or below the existing base contribution limit, could actually "exert a corrupting influence on the democratic system." *Id.* at 21.

On April 19, 2013, the FEC reported that federal candidates, political parties, and PACs raised a total of $7,135,700,000, and spent $7,004,700,000, during the 2012 election cycle. *See* FEC Press Release, *FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle* (Apr. 19, 2013), http://fec.gov/press/ press2013/20130419_2012-24m-Summary.shtml. Organizations that are not registered with the FEC (that is, persons other than political committees) reported an additional $300,400,000 in independent expenditures, bringing the total reported spending figure to $7,305,100,000. *Id.* $3.5 million is 0.048% of this sum. The nominally large figures routinely presented by proponents of strict contribution limits are far less remarkable when considered in context. What the FEC and supportive *amici* argued is that no donor *should be* permitted to inject a total of $3.5 million into the political system (even if that amount represents a tiny fraction of total election spending that is divided among hundreds of recipients). As this Court has previously recognized, this anti-distortion/leveling-the-playing-field rationale has no legitimate place in the American system.[5]

---

[5] This argument also ignores the fact that individuals already inject $3.5 million or more into the American political system at the federal level. Last year, at least 10 individuals contributed more than $3.5 million to one or more FEC-regulated independent expenditure-only

This Court, having rejected the anti-distortion rationale in *Davis*, *Citizens United*, and *Arizona Free Enterprise Club PAC*, should take this opportunity to clear away another vestige of that now-discredited concept: the imposition of aggregate limits as an expression of disapproval of so-called "massive" contributions into the political system as a whole.

II. A NATIONAL PARTY COMMITTEE'S RELATIONSHIP WITH ITS CANDIDATES IS NOT SHAPED BY THE AGGREGATE LIMITS, AND OTHER PROVISIONS OF FECA GOVERN THE DIRECT INTERACTIONS OF PARTIES AND CANDIDATES

When a national party committee receives a contribution from a supporter, it is limited (both legally, but also as a practical matter) in how it may spend that contribution. Assuming the contribution was not earmarked, the national party might spend those funds in any of the following ways:

(1) Contribute the money to one or more federal candidates, subject to applicable contribution limits;

(2) Contribute the money to one or more federal political committees (PACs), subject to applicable contribution limits;

---

committees ("Super PACs"). *See* Al Shaw & Kim Barker, *PAC Track: What and Where Are the Super PACs Spending?: Top Contributors To Super PACs*, ProPublica (Dec. 7, 2012), http://projects.propublica.org/pactrack/ #contributions=all.

(3) Transfer the money to a state or local committee of the same political party (not limited);
(4) Engage in coordinated expenditures on behalf of one or more of its candidates for office, subject to applicable party coordinated expenditure limits;
(5) Pay costs related to generic party voter identification and voter registration, get-out-the-vote efforts, and other voter education projects;
(6) Pay overhead, administration, staffing, and other organization/infrastructure costs; or
(7) Use the funds to make independent expenditures (unlimited).

The aggregate limits do not directly factor into any of these spending options, and none of these options represents a means of aiding and abetting the original contributor's circumvention of applicable contribution limits. In fact, such circumvention is prohibited by FECA's limitations on contributions and coordinated expenditures, as well as by provisions that require the proper attribution of earmarked contributions. Nor do the aggregate limits have any direct impact on the relationship of the NRSC and NRCC with their respective candidates for office. The aggregate limits serve only to reduce the overall amount that national party committees *could* raise insofar as the aggregate limits force donors to limit and apportion their contributions among party committees. With no other legal impediments in place, if the national party committees were able to raise more money from the limited universe of available donors, they

could, in theory, spend more on any of the categories listed above.

This does not, however, change the fact that other legal impediments abound. The level of support that a national party committee may provide its candidates is so strictly circumscribed and limited in other ways under existing law that removal of the aggregate limits would not have any significant effect on the financial relationship between the national parties and their candidates. Contrary to the suggestions of some, invalidation of the aggregate limits would *not* put national party committees in a position to facilitate circumvention of the contribution limits to candidates or other political committees.

A. A National Party Committee Is Limited In The Amount It May Contribute To A Candidate By A Direct Contribution Limit, Not By The Aggregate Limits

Federal law permits a national party committee to contribute a maximum of $5,000 per election to a U.S. House or Presidential candidate. 2 U.S.C. § 441a(a)(2)(A). A separate shared limit applies to U.S. Senate candidates, which allows the NRSC or DSCC, along with the national committee of a political party (that is, the RNC or DNC) to contribute up to $45,400 in the aggregate per campaign (not per election). *Id.* § 441a(h).

The NRCC could, under these limits, contribute a total of $5,000 per election to each of its

435 candidates each election cycle. Assuming each candidate faces a primary and general election, and ignoring run-off and special elections, this amounts to $4,350,000 every two years in direct contributions to candidates (or 0.06% of $7 billion). Regardless of how much money the NRCC can raise, it cannot contribute any more than this sum to its candidates.

The NRSC could, under its shared limits with the RNC, contribute up to $45,400 to each of its 100 Senate candidates that are up for election over a six-year period. This totals $4,540,000 every six years, and not more than $1,543,600 in a single election cycle in which 34 U.S. Senate seats are up for election (or 0.02% of $7 billion). Regardless of how much money the NRSC can raise, it cannot contribute any more than these sums over a six-year or two-year period, respectively.

Every national party committee raises substantially more than these totals, on both annual and biennial bases, even with the aggregate limits in place. The aggregate limits are not critical factors in a national party committee's decision to make contributions to as many of its candidates as it deems strategically wise, and invalidation of the aggregate limits would not – and could not under existing laws not challenged here – result in any national party committee making any contributions to candidates beyond what is currently permitted under existing law. A national party committee is simply not permitted to make unlimited contributions or transfers to its candidates.

A review of publicly available records for the last several election cycles shows that the U.S.

House and Senate committees of the Republican and Democratic Parties did not come close to contributing the allowable maximum to their candidates. In 2012, for example, the NRCC contributed $639,090 to candidates; the DCCC contributed $863,217 to candidates; the NRSC contributed $775,800 to candidates; and the DSCC contributed $646,500 to candidates.

These figures reflect strategic choices regarding the best use of a committee's funds. For example, even with unlimited resources on hand, a party committee might not contribute to an unknown challenger facing a popular incumbent who is almost certain to be reelected if it believes that $5,000 could be better spent elsewhere. The invalidation of the aggregate limits would not change this calculation, and would not result in any fundamental change to the political party-candidate relationship. Rather, it would simply expand the party committee's ability to amass resources that would then be available to fund activities that the committee already undertakes, and which are already permitted under existing law.

B. A National Party Committee Is Limited In The Amount It May Spend In Coordination With A Candidate By A Direct Limit On Party Coordinated Expenditures, And Not By The Aggregate Limits

In addition to the contributions that a national party committee may make directly to its candidates, described above, the national party

committee and a state party committee may both make limited coordinated expenditures in connection with the general election campaigns of their own candidates for Federal office. *See* 2 U.S.C. § 441a(d)(3)(A)-(B).

FECA grants coordinated party expenditure authority only to "the national party committee" (long interpreted to mean either the RNC or DNC) and each of the state party committees. By regulation, the FEC permits either the RNC/DNC or the state party committee to assign its party coordinated spending authority to another political party committee. *See* 11 C.F.R. § 109.33(a) ("The national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may assign its authority to make coordinated party expenditures authorized by 11 CFR 109.32 to another political party committee."). Party coordinated spending authority is routinely assigned by the RNC to both the NRSC (to spend on behalf of Republican Senate candidates) and the NRCC (to spend on behalf of Republican House candidates). *See* FEC Advisory Opinion 1986-31 ("DSCC also serves as the agent of the Democratic National Committee and state committees for purposes of making coordinated party expenditures in senatorial general election campaigns pursuant to 2 U.S.C. 441a(d)"). Thus, while the NRSC and NRCC are not granted statutory authority to engage in coordinated spending on behalf of their respective candidates, in practice, both routinely exercise this authority pursuant to FEC regulation, and this spending has become an important function of both committees.

The 2013 general election party coordinated expenditure limitation for a House of Representatives election is $46,600, except in states with only one representative, where the limit is $93,100. For Senate elections, the limit ranges from $93,100 to $2,682,000. 2013 FEC Price Index Adjustments, 78 Fed. Reg. at 8531

Accordingly, party committees are *not* free to support their own candidates with coordinated expenditures. There are strict limits on coordinated expenditures that a party may make on behalf of its candidates for office. *See Colorado II*, 533 U.S. at 465 (Thomas, J., dissenting) ("The Party Expenditure Provision, 2 USC § 441a(d)(3), severely limits the amount of money that a national or state committee of a political party can spend in coordination with its own candidates for the Senate or House of Representatives."). This Court upheld the party coordinated expenditure limits in *Colorado II* as a valid anti-circumvention measure that protects the base candidate contribution limits. *See Colorado II*, 533 U.S. at 465 ("[A] party's coordinated expenditures . . . may be restricted to minimize circumvention of contribution limits").

A review of public records demonstrates that the NRCC, DCCC, NRSC, and DSCC have not "maximized" their total possible party coordinated spending (assuming that authority is fully assigned by the RNC and DNC) in the last several election cycles. For example, in 2012, the NRCC spent $4,716,306 in coordinated party expenditures, while the NRSC spent $7,706,227. (The DCCC and DSCC spent $5,348,666 and $9,354,010, respectively.) With respect to U.S. House elections, the national

party committee and state party committee were authorized by FECA to spend a total of $20,474,400 each in 2012. *See* Federal Election Commission Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 77 Fed. Reg. 9925, 9926 (Feb. 21, 2012) [hereinafter 2012 FEC Price Index Adjustments].[6] With respect to U.S. Senate elections, each party's national party committee and state party committees were authorized by FECA to spend a total of $21,916,800 each in coordination with their Senate candidates in 2012. *Id.*

The party coordinated expenditure limits have nothing to do with the aggregate limits, and if the aggregate limits were held unconstitutional, parties could still make the exact same amount of coordinated expenditures on behalf of their own candidates. If more funds became available to national party committees with the aggregate limits removed, those committees *might* choose to further exercise their existing ability to make party coordinated expenditures. Removal of the aggregate limits, however, would not create or permit any opportunity for circumvention.

The District Court, nevertheless, found that the aggregate limits are "justified" as an anti-

---

[6] In 2012, eight states had only one U.S. House Representative and the party coordinated expenditure limit for these elections was $91,200 each. The remaining 427 U.S. House elections were subject to a party coordinated spending limit of $45,600. In addition, the parties were permitted to spend $45,600 in connection with Delegate/Resident Commissioner elections in the District of Columbia, Puerto Rico, and four territories.

circumvention measure that somehow prevents party committees from engaging in improper coordinated expenditures with candidates. *McCutcheon*, 893 F. Supp. 2d at 140. The District Court speculated that party committees might use a joint fundraising committee to route a $500,000 contribution to a single committee's coffers to be spent on coordinated expenditures. *Id.* (internal citation omitted). In 2012, there were only 12 states where the NRSC could have lawfully made more than $500,000 in coordinated expenditures in support of a candidate, and no states where the NRCC could have done so. *See* 2012 FEC Price Index Adjustments, 77 Fed. Reg. at 9926.

As noted *infra* in Section III, a donor may not circumvent *any* base contribution limit by contributing to a joint fundraising committee, and what the District Court describes is a series of transactions that, aside from the dollar amount at issue, are all perfectly legal under existing law, and which do not even remotely resemble "circumvention" of the base contribution limits. Under current law, roughly the same result could be achieved with a currently legal $76,400 contribution to a joint fundraising committee consisting of a national party committee and five state party committees.

The District Court appears to presume, however, that if the dollar amount at issue is raised to $500,000, then the net effect of these various legal transactions becomes corrupting as a constitutional matter, and therefore subject to limitation. The District Court then concludes that a restriction is justified on the basis of the rejected "gratitude"

rationale (despite claiming not to do so). *See Citizens United*, 558 U.S. at 359 ("The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . . ."). In short, the District Court's analysis was both factually and constitutionally flawed.

C. Candidates May Not Contribute Funds To Other Candidates Without Limitation, And Candidate-To-Candidate Contributions Generally Originate From Small Numbers Of Officeholders

While national, state, and local committees of the same political party may freely transfer funds amongst themselves, *see* 2 U.S.C. § 441a(a)(4), candidates do not enjoy this same freedom.[7] Instead, one federal candidate committee is permitted to "support" another federal candidate with a contribution of no more than $2,000 per election. *Id.* § 432(e)(3)(B). Candidates cannot circumvent this $2,000 limit by utilizing multiple authorized committees, as "[a]ll authorized committees of the same candidate for the same election to Federal office are affiliated," 11 C.F.R. § 100.5(g)(1), and contributions to affiliated committees are aggregated for contribution limit purposes. *See* 2 U.S.C. § 441a(a)(5). Thus, candidate-to-candidate contributions are strictly limited and do not provide an avenue for circumventing contribution limits.

---

[7] Federal candidates and officeholders may transfer unlimited campaign funds to federal and state party committees. *See* 2 U.S.C. § 439a(a)(4).

In addition, a contributor who gives to a candidate committee, but directs that his or her contribution then be transferred to another specified candidate, has "earmarked" that contribution. An "earmarked" contribution must be treated as a contribution from the donor to the candidate for whom the contribution was earmarked, and the intermediary committee must report the transaction on its own financial disclosure reports. *See id.* § 441a(a)(8).

Candidate-to-candidate contributions are not highly prevalent, and most originate from a small number of Congressional candidate committees. For example, during the 2012 election cycle, there were 2,756 reported contributions from one U.S. House candidate committee to another candidate committee in the FEC's databases. The sum value of these contributions was $3,651,202. However, 1,490 of these contributions, or approximately 54% of all reported candidate-to-candidate transfers, came from only 20 House Members. Fifty-five (55) House Members were responsible for 80% of all candidate-to-candidate contributions in the 2012 election cycle. (The figures from 2010 are very similar: 20 House Members made nearly 55% of all candidate-to-candidate contributions, and 47 House Members were responsible for 80% of all candidate-to-candidate contributions). Thus, while a nominally large sum is contributed by candidates to other candidates, a relatively small percentage of House Members is responsible for most of the giving; it is not a widespread practice that enables any circumvention of applicable limits.

One of *amici* Campaign Legal Center's and Democracy 21's imagined circumvention schemes posits that a donor "[w]ill contribute more modest sums to a large number of candidate committees that will pass on these funds to her favored candidates." Mem. of Campaign Legal Ctr. and Democracy 21 at 28, *McCutcheon*, 893 F. Supp. 2d 133 (No. 12-cv-1034). These *amici* claim that the aggregate limits "[e]nsur[e] that donors cannot route hundreds of contributions to their preferred candidates through other candidate committees." *Id.* at 29. Of course, this scenario would be illegal even without the aggregate limits in place: the existing conduit and earmarking provisions prevent it, and a massive conspiracy would be required to carry out what is imagined by *amici*. The end result of *amici*'s hypothetical could only be achieved legally if these hundreds of "other candidate committees" all *independently* concluded that it would be wise to transfer $2,000 to a certain candidate. If this somehow occurred, the initial donor is not part of the equation, meaning that donor poses no corruption threat.

III. JOINT FUNDRAISING COMMITTEES ARE NOT A MEANS OF CIRCUMVENTING CONTRIBUTION LIMITS

The District Court was persuaded that a viable anti-circumvention rationale existed in support of the aggregate limits insofar as those limits serve to prevent contributors from routing large contributions to one committee through an intermediary joint fundraising committee ("JFC"). *See McCutcheon*, 893 F. Supp. 2d at 140 ("[W]e

cannot ignore the ability of aggregate limits to prevent evasion of the base [contribution] limits"). The District Court erred, however, when it concluded that joint fundraising committees are a mechanism that can be used to circumvent contribution limits. The District Court supposed that "[a]n individual *might* . . . give half-a-million dollars in a single check to a joint fundraising committee," that "[t]he half-a-million dollar contribution *might* . . . find its way to a single [party] committee's coffers," that committee "*might* use the money for coordinated expenditures," and "[t]he candidate who knows the coordinated expenditure funding derives from that single large check at the joint fundraising event will know precisely where to lay the wreath of gratitude." *See id.* (emphasis added).

As explained below, a donor's contribution to a JFC is generally distributed among participating committees according to a default allocation formula, although a donor may also instruct that his or her funds be allocated differently, provided that allocation complies with all applicable contribution limits. A donor may not, however, contribute to a JFC with instructions for how proceeds should be subsequently transferred from one participant committee to another. Existing prohibitions against using conduits to contribute in the name of another, as well as the well-established legal consequences of "earmarking" a contribution, make this impossible to do legally. If a candidate or party committee transfers its joint fundraising proceeds to another party committee, those transfers must be the result of the candidate's or party committee's own independent judgment.

The District Court, however, conceives of JFCs as little more than a means of avoiding and evading the otherwise applicable contribution limits – a seriously flawed understanding that appears to derive from *amici* Campaign Legal Center and Democracy 21.[8] As entities with first-hand knowledge of the actual operations of JFCs, however, *amici* here can offer a more accurate and complete analysis of the nature and workings of those committees.

A. A Joint Fundraising Committee Is A Highly Regulated Method Of Fundraising That Permits A Donor To Efficiently Contribute To Multiple Political Committees Simultaneously

Contrary to what was suggested to the District Court, JFCs do not, and in the absence of the biennial aggregate individual contribution limits would not, allow for "multi-million dollar contributions" to any political committee in violation of any base limit. *See* Mem. of Campaign Legal Ctr. and Democracy 21 at 6, *McCutcheon*, 893 F. Supp. 2d 133 (No. 12-cv-1034). Depending on the identity of the participating committees, a JFC allows a donor to make multiple contributions of up to $2,600 per election to a federal candidate, multiple contributions of up to $5,000 per year to political action committees, multiple contributions of up to

---

[8] *See* Mem. of Campaign Legal Ctr. and Democracy 21 at 6-8, *McCutcheon*, 893 F. Supp. 2d 133 (No. 12-cv-1034).

$10,000 per year to state party committee federal accounts, and multiple contributions of up to $32,400 per year to national party committees via one check or credit card transaction.[9] There is absolutely no reason to be alarmed by Contributor A, who writes one check in the amount of $7,800 and presents that check to three candidates with the expectation that they split it evenly, as opposed to Contributor B who writes three separate checks for $2,600 to each of those same three candidates. Contributor A has *not* made a contribution of $7,800 to anyone. Rather, Contributor A has made three contributions of $2,600, just like Contributor B. The only difference is that Contributor A has written two fewer checks.

The FEC formally recognized JFCs in its 1983 regulations at 11 C.F.R. § 102.17, which "[s]ets forth the basic rules for conducting joint fundraising activities." FEC Transmittal of Regulations to Congress on Transfer of Funds; Collecting Agents, Joint Fundraising, 48 Fed. Reg. 26,296, 26,298 (June 7, 1983). These regulations, which have not been significantly amended since 1983, set forth extensive rules and procedures for any political committee wishing to raise funds jointly with another committee. JFCs are highly-regulated operations that are subject to pages of FEC requirements to ensure that (1) all contribution limits, source prohibitions, recordkeeping and reporting requirements are stringently observed, and (2) contributors are aware of exactly what the

---

[9] Under existing law, the aggregate limits serve as a cap on JFCs insofar as an individual contributor to the committees participating in a JFC cannot contribute more than $123,200 during the 2013-2014 election cycle.

committee is and how their contributions will be divided.

A JFC consists of two or more participant committees engaged in activities to raise funds jointly. Participants usually establish a separate committee (that is, the JFC) to serve as the fundraising representative. 11 C.F.R. § 102.17(a)(1). This separate committee must register with the FEC, collect and maintain the same records, and file the same periodic financial disclosure reports as any other political committee. *Id.* § 102.17(a)(1), (c)(4).

JFC participants must "[e]nter into a written agreement," which "[s]hall identify the fundraising representative and shall state a formula for the allocation of fundraising proceeds. The formula shall be stated as the amount or percentage of each contribution received to be allocated to each participant." *Id.* § 102.17(c)(1).

Joint fundraising participants must also provide a detailed written notice with each solicitation of funds to inform potential donors of: (1) the names of the participant committees; (2) the allocation formula to be used to distribute proceeds; (3) a statement informing contributors that they are not required to adhere to the established allocation formula and may, instead, provide their own designation of funds (provided such designation complies with all applicable contribution limits); and (4) a statement informing contributors that the allocation formula may be altered if the a contributor makes a contribution that would exceed that contributor's limit to any given participant. *Id.* § 102.17(c)(2).

The JFC may then hold fundraising events, or raise funds by other methods, such as through direct mail or the Internet. "The fundraising representative and participating committees shall screen all contributions received to insure that the [contribution] prohibitions and limitations of 11 CFR parts 110 and 114 are observed." *Id.* § 102.17(c)(4)(i). Once the JFC receives contributions, those funds are deposited into the JFC's separate account, and gross proceeds are allocated among the committees according to the formula set forth in the written notice. If this "default" allocation results in a contributor exceeding a contribution limit, the funds are "reallocated," if permissible, to ensure that each contributor adheres to all applicable contribution limits. *See id.* § 102.17(c)(6)(i). If a contribution cannot be reallocated permissibly, the contribution is refunded to the donor. Under no circumstances may a contribution to a JFC lawfully result in an allocation that exceeds a donor's applicable contribution limit.

The JFC is required to file comprehensive financial activity reports with the FEC, disclosing all funds raised and disbursed. The participating committees must report their allocated gross proceeds and net distributions, including "[a] memo Schedule A itemizing its share of gross receipts as contributions from original contributors to the extent required under 11 CFR 104.3(a)." *Id.* § 102.17(c)(8)(i) – (ii). As of result of these dual filings, interested parties can easily see how much an individual contributor gave to a joint fundraising committee in total, as well as how that total amount was divided among the participants.

B. Joint Fundraising Committees Have Existed Since The Origin Of FECA, And Have Consistently And Historically Collected Contributions Up To The Applicable Limit For Each Participating Committee

JFCs are not a novel or recent creation; they are a long-accepted practice of which Congress is well aware. The FEC considered the permissibility of joint fundraising very early in its history in a series of Advisory Opinions issued in 1977. *See* Federal Election Commission Advisory Opinions 1977-08 (approving joint fundraising to retire outstanding campaign debt), 1977-14 (approving joint fundraising to retire outstanding campaign debt), 1977-23 (approving a joint fundraising effort consisting of 11 members of the "Freshman Republican Class of the 95th Congress") and 1977-61 (approving a joint fundraising committee consisting of a candidate committee and the Colorado State Democratic Central Committee); *see also* Federal Election Commission Advisory Opinion 1979-35 (approving joint fundraising effort between Democratic Senatorial Campaign Committee and "certain Democratic Senate candidates").

The earliest of these Advisory Opinions, issued April 20, 1977, makes clear that a contribution to a JFC has *always* been conceived of as multiple contributions aggregated into a single check, and subject to all applicable limits. *See* Advisory Opinion 1977-14 at 2 ("All persons making contributions to the Special Committee will be

regarded as making a contribution to the participating presidential campaigns; this means that an appropriate accounting system must be utilized to assure compliance with the contribution limits.").

Only more recently have JFCs become an object of scorn within the "campaign finance reform" community, which has transformed the JFC into a useful red herring. Publicly, "reformers" have crafted a narrative in which JFCs allow donors to exceed the otherwise applicable contribution limits, while serving as convenient opportunities for influence-peddling.[10] *Amici* Campaign Legal Center and Democracy 21 repeated some of this rhetoric in their brief to the District Court. *See, e.g.*, Mem. of Campaign Legal Ctr. and Democracy 21 at 6,

---

[10] *See, e.g.*, Joseph Morton, *Kerrey, Dems Set Up Joint Fundraising Committee*, Omaha World-Herald (Apr. 11, 2012), http://www.omaha.com/article/20120410/NEWS01/120419949/0 ("Meredith McGehee, policy director at the Campaign Legal Center, said joint fundraising committees represent a way to quickly and conveniently get large donations in the door. She said the joint committees are rooted in the wink-and-a-nod understanding that while the bulk of the donations go to the state party, that money is ultimately intended to benefit the candidate in question. 'Everybody knows it's just a way of legally earmarking additional money for the candidate,' she said."); Alex Knott, *Politicians Create Record Number of Joint Fundraising Committees*, Roll Call (Sept. 17, 2010), http://www.rollcall.com/news/-49934-1.html ("In these situations, the candidate often gets recognition with the national party for the money he or she has raised in 'much the same way that bundlers get credit for how they raise contributions,' said Richard Hasen, a professor specializing in election law at Loyola Law School in Los Angeles. 'It's a way to gain stature in the party.'").

McCutcheon, 893 F. Supp. 2d 133 (No. 12-cv-1034) ("[D]onors are relieved of the logistical challenge of making separate contributions to an array of different committees, and instead can simply write one check to the joint fundraising entity and receive immediate recognition for their largesse."); *id.* at 6-7 (asserting that joint fundraising committees "[c]ombin[e] the allure of candidate access with higher-limit party committees").

In a more candid moment, however, one of the *amici*'s representatives acknowledged that JFCs are not actually tools of contribution limit circumvention and influence and access seeking. In 2010, the Campaign Legal Center's Paul Ryan said of JFCs, "The only thing that a joint fundraising committee allows is for one check to be written instead of multiple checks." Alex Knott, *Politicians Create Record Number of Joint Fundraising Committees*, Roll Call (Sept. 17, 2010), http://www.rollcall.com/news/-49934-1.html.

A JFC is nothing more than an administrative convenience, for both political committees and donors. The candidates and party committees that participate in a JFC may host fundraising events or direct mail campaigns together, thereby achieving fundraising cost savings and other efficiencies, while donors may make contributions to the participants without the burden of attending multiple events and/or writing a separate check to each participant. JFCs enable donors to exercise their constitutional and statutory rights efficiently; they do not permit *anyone* to exceed or evade any existing contribution limit. To the extent that anyone actually believes that JFCs create the "appearance" that candidates

and parties solicit unlawful amounts of money, or that donors contribute amounts above the contribution limits, that "appearance" is the product of an uninformed misunderstanding.

The question of what could theoretically – and illegally – be done is far different than what real-life, rational actors actually do. Our experience with JFCs goes beyond merely fretting about them, and in our considerable experience, neither candidates nor political parties have any interest in joint fundraising for the sake of helping donors evade campaign finance laws.

Broad prophylactic rules that infringe on First Amendment rights should not be upheld where they serve only to protect against highly improbable, and likely illegal, hypothetical situations dreamed up by interest groups. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("[W]e have never accepted mere conjecture as adequate to carry a First Amendment burden"). Limitations on a citizen's First Amendment rights cannot be drawn to target the most outlandish hypotheticals that interest groups can conceive, especially where those interest groups have an interest in manufacturing the "appearance" of corruption that this Court has held can justify campaign finance regulation.

CONCLUSION

For the foregoing reasons, the provisions of 2 U.S.C. § 441a(a)(3) at issue in this matter should be declared unconstitutional and the decision of the United State District Court for the District of Columbia reversed.

Respectfully submitted,

Jason Torchinsky
Counsel of Record
Thomas J. Josefiak
J. Michael Bayes
Holtzman Vogel Josefiak PLLC
45 North Hill Drive
Suite 100
Warrenton, VA 20186
(540) 341-8808
(540) 341-8809
Jtorchinsky@hvjlaw.com
Counsel for *Amici Curiae*

Jessica Furst Johnson
General Counsel
National Republican
Congressional Committee
310 First Street, SE
Washington, DC 20003

Megan L. Sowards
General Counsel
National Republican Senatorial
Committee
425 Second Street, NE
Washington, DC 20002

May 10, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-536

Supreme Court, U.S.
FILED
MAY 13 2013
CLERK

In the Supreme Court of the United States

SHAUN McCUTCHEON AND
REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States
District Court for the District of Columbia

BRIEF OF TEA PARTY LEADERSHIP FUND, NATIONAL DEFENSE PAC, COMBAT VETERANS FOR CONGRESS PAC, CONSERVATIVE MELTING POT PAC, AND FREEDOM'S DEFENSE FUND PAC AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

PAUL D. KAMENAR
Counsel of Record
COOLIDGE REAGAN FOUNDATION
1629 K Street, N.W., Suite 300
Washington, D.C. 20006
(202) 603-5397
paul.kamenar@gmail.com

Counsel for Amici Curiae

Date: May 13, 2013

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 8

I. POLITICAL ACTION COMMITTEES HAVE FIRST AMENDMENT RIGHTS ENTITLED TO THE HIGHEST CONSTITUTIONAL PROTECTION 8

A. PACs Play An Important Role In The American Political System 8

B. PACs Enjoy First Amendment Protection 11

II. THE AGGREGATE LIMITS DO NOT SURVIVE STRICT OR EXACTING SCRUTINY 13

A. Aggregate Limits Do Not Serve Any Constitutionally Valid Government Interest 13

1. The 1976 FECA Amendments Rectified Any Circumvention Risk .. 14

2. Any Other Government Interest Is Constitutionally Impermissible 18

B. Since No Valid Anti-Corruption Interest Exists, the Aggregate Limits Are Not Closely Drawn And Serves As An Unnecessary Prophylaxis 20

III. RESTRICTIVE AGGREGATE LIMITS DISPROPORTIONATELY IMPACT PACS AND COMPOUND THE HARMS OF A SKEWED CAMPAIGN FINANCE SYSTEM 22

A. The Aggregate Limits Hamper PAC Speech And Decrease Competition Of Ideas 22

B. The Base Contribution Limits, Unadjusted For Inflation, Only Exacerbate The Harm 23

CONCLUSION 26

TABLE OF AUTHORITIES

Cases **Page(s)**

Buckley v. Valeo,
424 U.S. 1 (1976) ..... *passim*

Cal. Democratic Party v. Jones,
530 U.S. 567 (2000) 11

California Medical Association v. FEC,
453 U.S. 182 (1981) ..... *passim*

Carey v. FEC,
791 F. Supp. 2d 121 (D.D.C. 2011) 1, 2

Citizens Against Rent Control v. City of Berkeley,
454 U.S. 290 (1981) 11, 18

Citizens United v. FEC,
558 U.S. 310, 130 S. Ct. 876 (2010) ..... *passim*

Davis v. FEC,
554 U.S. 724 (2008) 18

Eu v. San Francisco County Democratic Central Comm.,
489 U.S. 214 (1989) 10

FEC v. Nat'l Conservative Political Action Comm.,
470 U.S. 480 (1985) 6, 13

FEC v. Wisc. Right to Life, Inc.,
551 U.S. 449 (2007) 7, 822

First Nat'l Bank v. Bellotti,
435 U.S. 765 (1978) 12

McConnell v. FEC,
540 U.S. 93 (2003) 19, 21

McCutcheon v. FEC,
893 F. Supp. 2d 133 (D.D.C. 2012)
(three-judge court) 15, 19, 20

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) 10, 11

NAACP v. Button,
371 U.S. 415 (1963) 21

Nixon v. Shrink Missouri,
528 U.S. 377 (2000) 23

Republican Nat'l Comm.,
698 F. Supp. 2d 150 (D.D.C. 2010) 14, 19

Riley v Nat'l Fed. Of the Blind,
487 U.S. 781 (1988) 26

Tashjian v. Republican Party,
479 U.S. 208 (1986) 9

United States v. Danielczyk,
683 F.3d 611 (4th Cir. 2012) 13

Wagner v. FEC,
No. 11-1841, 2012 WL 1255145 (D.D.C. 2012) .. 6

Wis. Right to Life State Political Action Comm. v. Barland,
664 F.3d 139 (7th Cir. 2011) 13

Constitutional Provisions

U.S. Const., amend. I ..... *passim*

Codes, Rules, and Statutes

Federal Election Campaign Act Amendments of 1976 ..... *passim*

2 U.S.C. § 431 ..... 4, 9

2 U.S.C. § 441a(a)(1) 5, 12, 24, 25

2 U.S.C. § 441a(a)(3) 5, 12, 24

2 U.S.C. § 441a(a)(5) 16

2 U.S.C. § 441a(c)(1) 5, 25

2 U.S.C. § 441a(f) 24

Regulations

11 C.F.R. § 100.5(a) 4, 9

11 C.F.R. § 102.1(d) 4, 9

INTEREST OF *AMICI CURIAE*[1]

The Tea Party Leadership Fund ("TPLF") is a non-connected hybrid[2] political action committee ("PAC") dedicated to promoting individual freedom, limited federal government, and returning political power to the states and the people.

TPLF registered with the Federal Election Commission ("FEC") on May 9, 2012. Since then, TPLF has received contributions in mostly small-dollar amounts from over 25,000 individuals and has contributed to more than five candidates, and thus is considered a multicandidate committee permitted by law to make contributions of up to $5,000 to each

---

[1] Pursuant to Sup. Ct. Rule 37.6, co-counsel for Appellant McCutcheon has made a monetary contribution to partially fund the preparation of this brief. No other person, other than *amici curiae,* their members, or their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

[2] A hybrid PAC is a political action committee that maintains a separate, non-contribution ("Carey") account from which it may receive unlimited contributions to make independent expenditures but which may receive only limited contributions from individuals with which to make PAC contributions to candidates. *Carey v. FEC*, 791 F.Supp.2d 121 (D.D.C. 2011). Throughout this brief, "PAC" refers to traditional PACs, *i.e.*, candidate-connected and non-connected political action committees, and hybrid PACs. Traditional PACs are subject to limits on contributions they may receive and contributions they may make to candidates and other committees; however, unlike individuals, PACs face no aggregate limit of contributions they may make to candidates or committees. *See* FED. ELECTION COMM'N, THE FEC CAMPAIGN GUIDE FOR NON-CONNECTED COMMITTEES at 1-2 (May 2008).

candidate per election. By pooling these contributions, TPLF is able to express its unique political perspective, engage in independent advocacy and contribute to political candidates. But under the aggregate contribution limits at issue in this case, individuals wishing to contribute to TPLF are prohibited from doing so if they have already reached their arbitrary and unconstitutional aggregate limits of contributions made to other committees or candidates, thereby preventing TPLF pooling such funds to make contributions to candidates that TPLF supports.

The National Defense Political Action Committee is dedicated to electing military veterans to the U. S. Congress who share the traditional American values of a limited fiscally responsible government, ensuring a strong national defense, protecting the rights/interests of service members, and our historic commitment to our veterans. The National Defense Political Action Committee, a hybrid non-connected PAC, was formed in 2000 and is chaired by Rear Admiral [Ret.] James J Carey. See *Carey v. FEC,* 791 F.Supp.2d 121 (D.D.C. 2011).

The Combat Veterans For Congress Political Action Committee (CVFC) is dedicated to supporting the election of fiscally conservative combat veterans to Congress. CVFC supports veteran-candidates who believe in limited government, will rein in the out-of-control spending of Congress, are committed to preserving and defending the U.S. Constitution, and will support the independence and freedom of the individual as outlined in the Bill of Rights. CVFC supports candidates who are also dedicated to promoting the free enterprise system creating the

greatest economic engine in the history of mankind, who support a strong national defense, and will endorse the teaching of U.S. history and the Founding Fathers' core values in educational institutions. CVFC, a "traditional" non-connected PAC, was formed in 2009 and is chaired by Captain [Ret.] Joseph John.

Conservative Melting Pot Political Action Committee was created to bring the GOP back to its roots as the party promoting equality and economic opportunity for all, by supporting federal and state candidates, particularly minorities and women, who are committed to taking the conservative message to every demographic. Conservative Melting Pot Political Action Committee, a "traditional" non-connected PAC, was formed in 2013 and is chaired by Crystal Wright.

Freedom's Defense Fund PAC is dedicated to the principles of limited government, as the Founders understood them. Freedom's Defense Fund believes that when government oversteps the bounds of its authority, it does so at the expense of liberty, and that in order for America to prosper it must be free from the shackles of the nanny state. Freedom's Defense Fund Political Action Committee, a "traditional" non-connected PAC, was formed in 2012 and is chaired by Michael Centanni.

This case is particularly important to all *amici* because the aggregate contribution limits prohibit like-minded individuals from contributing to and associating with *amici* and other PACs once those individuals have reached their aggregate contribution limits. The aggregate contribution limits also effectively bar *amici* and all other PACs from

associating with such individuals and from speaking "too much" in the political marketplace, thereby diminishing PAC speech relative to that of candidates and national party committees. In short, *amici*'s First Amendment rights of association and speech are unconstitutionally abridged by the aggregate individual contribution limits.

SUMMARY OF THE ARGUMENT

The aggregate contribution limits imposed on individuals not only critically infringe upon their core First Amendment rights, but also inflict a special constitutional injury on the exercise of political speech by all PACs, including *amici*. PACs play an integral part in the American political process, and their robust participation in state and federal elections is fundamental to our very system of self-governance. With distinct viewpoints focusing on issues spanning the political spectrum, PACs provide the means for all individuals to join with like-minded citizens and make their voices heard. Indeed, establishing a PAC is *mandatory* for individuals who wish to engage in collective political advocacy independent from campaigns and national party committees. *See* 2 U.S.C. § 431(4); 11 C.F.R. § 100.5(a); § 102.1(d). Any two people who wish to pool their resources and exercise their First Amendment rights by participating in the political campaign process must register as a PAC within ten days of their contributions or expenditures exceeding $1,000, and are subject to the myriad of statutory provisions and FEC regulations. *Id.* PACs are immediately subject to both base limits on contributions from individuals and aggregate contribution limits that limit PACs' ability to exercise

their core First Amendment rights. 2 U.S.C. § 441a(a)(3)(B).

The base contribution limits bar PACs from soliciting or accepting contributions from individuals of more than $5,000 per election. Moreover, once an individual has met his or her aggregate biennial contribution limit of $74,600 to non-candidate PACs and state and local party committees, that individual is barred from contributing any funds at all to additional PACs, ranging from even one dollar to the small, non-corrupting amount of $5,000. *See* 2 U.S.C. § 441a(a)(1)(C); § 441a(a)(3)(B). Individuals are further barred from contributing more than $48,600 to all candidate committees. Thus, the total aggregate limit of all political contributions from individuals cannot exceed $123,200. Further, the current legal regime arbitrarily does not index individual contribution limits to PACs to account for inflation, as is the case for an individual's contributions to all other candidate and party committees. Thus, PAC speech unfairly declines biennially in proportion to that of other political participants. *See* U.S.C. § 441a(c)(1).

The government can only justify such First Amendment injury by demonstrating a compelling governmental interest, which the regulation is narrowly tailored to advance or protect. *See Citizens United v. FEC*, 558 U.S 310, 340 (2010). But in order for a contribution or expenditure limit, both of which "operate in an area of the most fundamental First Amendment activities," *Buckley. Valeo*, 424 U.S. 1, 14 (1976), to survive *any* level of constitutional scrutiny, the government bears the burden of establishing a valid interest in preventing corruption or its

appearance. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("*NCPAC*"). As this Court made clear in *Citizens United*, the only kind of "corruption" that may be regulated is the actual or appearance of a "*quid pro quo.*" *See Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010). Preventing "*quid pro quo*" corruption is the only compelling governmental interest, and it is narrowly defined as an elected leader making legislative decisions (in Congress) or executive decisions (in the case of the President and his Cabinet) in return for financial support. Further, the regulation must be "closely drawn" and "avoid unnecessary abridgment of associational freedoms." *Wagner v. FEC*, No. 11-1841, 2012 WL 1255145, at *6 (D.D.C. 2012) (quoting *Buckley*, 424 U.S. at 25). Granting access and influence or showing gratitude do not amount to corruption; indeed, *amici* submit that regulating this behavior would unlawfully infringe on yet another important First Amendment right: the right to petition the government for a redress of grievances. *See Citizens United*, 130 S. Ct. at 909 (2010).

Here, the government has proffered no presently valid anti-corruption interest necessitating such serious infringement. In *Buckley v. Valeo*, this Court held that the single contribution ceiling for all contributions was constitutionally justifiable because it prevented individuals from circumventing contribution limits. 424 U.S. at 38. Thereafter, Congress enacted the 1976 Amendments to the Federal Election Campaign Act, which removed any possibility of lawful circumvention by adding new base limits on contributions to and by entities. Therefore, no cognizable government interest currently exists

sufficient to validate stifling highly protected political speech and association. Thus, the current aggregate limits at issue in this case established under the Bipartisan Campaign Reform Act of 2002 (BCRA) now serve as an impermissible "prophylaxis upon prophylaxis" as an anticorruption measure. See *FEC v. Wisc. Rt. to Life, Inc.*, 551 U.S. 449, 478-79 (2007) ("*WRTL*").

More significantly, the only compelling governmental interest in preventing *quid pro quo* corruption is totally absent with respect to contributions to PACs for a simple reason: unlike Members of Congress or the Executive, PACs do not introduce or vote on legislation, execute the laws, or otherwise bestow political favors. This absence of any possible corruption of PACs by individuals (or somehow twice-removed through PACs to the candidates the PACs support) is further underscored by the fact that the law does not impose *any* aggregate limits on contributions from PACs to candidates. Thus, there is no rational basis, let alone a compelling reason, for a law that limits the aggregate amount an individual may give to PACs, which have no legislative power, yet imposes *no* aggregate limit on the amount that PACs may contribute to incumbents who do, or to candidates who potentially will, wield such power. Moreover, if the aggregate limits are unconstitutional as applied to national party committees, as ably argued by Appellant RNC, then they are *a fortiori* unconstitutional as applied to non-connected PACs. After all, PACs have less influence on Members of Congress than their national party, and individual contributors to PACs even less so.

Amici urge this Court to adhere to well-developed First Amendment jurisprudence in this area and protect both an individual's and a PAC's First Amendment rights against unjustified government suppression. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Citizens United v. FEC*, 558 U.S. 310 (2010). As this Court has explained, the Constitution "demands at least" that it "give the benefit of the doubt to speech, not censorship." *WRTL*, 551 U.S. at 482.

ARGUMENT

I. POLITICAL ACTION COMMITTEES HAVE FIRST AMENDMENT RIGHTS ENTITLED TO THE HIGHEST CONSTITUTIONAL PROTECTION

A. PACs Play An Important Role In The American Political System

PACs emerged as a natural outgrowth of our time-honored, constitutionally protected national tradition of collective advocacy. In 1944, the Congress of Industrial Organizations established what is recognized as the first PAC, as individual contributors banded together with a single common goal: raising money for President Franklin D. Roosevelt's reelection. *See* WHAT IS A PAC?, THE CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/pacs/pacfaq.php. In 1974, the first year for which FEC data regarding PACs is available, 608 PACs were registered. *See* FED. ELECTION COMM'N, PAC COUNT: 1974- PRESENT (Jan. 2013). Within ten years, the number of PACs had multiplied significantly, and over 4,000 PACs existed, spurring citizens' involvement in the campaign process

and driving robust political debate. *See id.* Today, thirty years later, just slightly over 5,000 PACs exist. *See id.* Creating a PAC is an effective vehicle by which individuals can engage in collective federal electoral advocacy independently from campaigns and national party committees. For two or more individuals, forming a PAC is not just desirable but also mandatory: even the smallest organization must register as a PAC with the FEC within ten days of its contributions or expenditures exceeding $1,000, and is subject to the myriad of statutory provisions and FEC regulations governing its operation. *See* 2 U.S.C. § 431; 11 C.F.R. § 100.5(a); § 102.1(d). Because "virtually every means of communicating ideas in today's mass society requires the expenditure of money," *Buckley*, 424 U.S. at 19, spending this nominal amount is necessary for any sort of successful political communication. Thus, though the First Amendment extends strong protection to "the freedom to join together in furtherance of common political beliefs," *Tashjian v. Republican Party*, 479 U.S. 208, 214-215 (1986), PACs provide the only means for likeminded individuals to do so collectively outside of the parties and campaigns themselves, and allow individuals to contribute to candidates whom the PACs believe best deserves their support. Because many individuals do not have the time or resources to research the record and suitability of candidates deserving support as do like-minded PACs, such as those that support the environment or those like *amici* that support limited government, PACs serve a vital screening function in the electoral process.

As such, PACs have developed immeasurable importance in American politics. With specific,

individualized viewpoints focusing on distinct but diverse issues spanning the political spectrum, PACs provide the means for all voters, regardless of party identity (or lack thereof), to find common ground with like-minded citizens and make their voices heard. Permitting individuals to pool resources in this manner has "undeniably enhanced" their ability to engage in efficient, valuable advocacy. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). But aggregate limits operate to substantially burden desired PAC speech, stifling these unique voices so integral to modern debate.

Unlike the cursory analysis the lower court gave the constitutional issues presented in this case, this Court must carefully and skeptically examine even the slightest restriction on First Amendment activities. The First Amendment is "premised on mistrust of government power," and this Court has been unwilling to permit even minimal governmental infringement. *Eu v. San Francisco*, 489 U.S. 214, 223 (1989) (explaining that the First Amendment "has its fullest and most urgent application" to free discussion about candidates for political office). As an essential mechanism of our system of self-governance, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 339.

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. Indeed, our entire system of democracy "is unimaginable without the ability of citizens to band together in promoting

among the electorate candidates who espouse their political views." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). This is especially so when ordinary citizens come together in voluntary associations to advocate for particular issues they are passionate about, taking into account the inherent value of collective action for effective advocacy. *NAACP v. Ala.*, 357 U.S. at 460. Citizens joining in groups for purposes of political advocacy is a practice "deeply embedded in the American political process," and its inherent value is that "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981).

Like-minded Americans therefore join together not only to add to the debate, but to do so in a meaningful, effective manner. To be effective, such political speech requires financial support. The general notion that there is "too much money" in the aggregate in political campaigns is a spurious one, let alone a compelling one that can be presented as a valid means of preventing *quid pro quo* corruption. If anything, *amici* submit that funding of important political speech pales in comparison to the hundreds of billions collectively spent on advertising commercial products, such as burgers and beer. *See* http://www.businessinsider.com/the-35-companies-that-spent-1-billion-on-ads-in-2011-2012-11?op=1.

B. PACs Enjoy First Amendment Protection

The First Amendment extends strong protection not only to individual contributors but also to group associations, including PACs. *See Citizens United*, 558

U.S. at 342-43. That such associations are not "natural persons" does not in any way diminish their rights to engage in political speech and advocacy. *See First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978). In truth, most PACs are small and much more closely resemble the natural persons who organize and run them than they resemble large corporations, such as the bank in *Bellotti*. But the aggregate limits infringe on three First Amendment protections: speech, assembly or association, and the right to petition for redress of grievances.

The First Amendment guarantees that individuals voluntarily associating through PACs (and being forced by the FECA to register as such) are entitled to the highest constitutional protection. But the aggregate limits prevent PACs like *amici* from freely associating with willing contributors. TPLF and other *amici* want to accept contributions up to the non-corrupting amount of $5,000, and pool these resources for political advocacy purposes, including contributing to federal candidates. *See* 2 U.S.C. § 441(a)(a)(1). Countless putative speakers, such as Appellant McCutcheon, similarly wish to associate with PACs like TPLF and other *amici*, who share their viewpoints and can uniquely express those distinct perspectives. But the aggregate limits bar these speakers from contributing more than the circumscribed amounts and concomitantly prohibit TPLF, and all other PACs, from accepting these speakers' desired contributions. 2 U.S.C. § 441a(a)(3)(B). Because money is necessary for effective political speech, *Buckley*, 424 U.S. at 19, the aggregate limits circumscribe all PACs' ability to speak effectively. In today's media markets, the cost to candidates for getting their message out is ever

increasing, and candidates must necessarily rely on contributions from both individuals and PACs to communicate effectively. Similarly, PACs that also want to have an impact must accept and spend money to speak effectively.

II. THE AGGREGATE LIMITS DO NOT SURVIVE STRICT OR EXACTING SCRUTINY.

The lower court held and the FEC argued that the strict scrutiny test does not apply to contributions, and under the lower exacting scrutiny test, the aggregate limits are constitutional. *Amici*, however, agree with the Appellants that aggregate limits are more akin to speech and therefore, the higher strict scrutiny should apply. But in any event, the limits do not survive the lower exacting scrutiny test and arguably do not pass muster even under the rational basis test.

A. Aggregate Limits Do Not Serve Any Constitutionally Valid Government Interest

The government has a valid interest in preventing *quid pro quo* corruption or its appearance. *Buckley*, 424 U.S. at 27, 45, 47. This Court has defined corruption specifically and narrowly. "The hallmark of corruption is the financial quid pro quo: dollars for political favors." *NCPAC*, 470 U.S. at 497 (emphasis added). The government has a corresponding interest in preventing circumvention of contribution limits, which Congress ostensibly imposed to further a valid anticorruption interest. See *United States v. Danielczyk*, 683 F.3d 611, 618 (4th Cir. 2012), cert. denied, 133 S. Ct. 1459 (2013); *Wis. Right to Life State Political Action Comm. v.*

Barland, 664 F.3d 139, 153 (7th Cir. 2011). Under any level of scrutiny, when a law abridges a speaker's First Amendment rights, the government bears the burden of proving that a risk of corruption or its appearance exists to render the restriction necessary. *See id.*

The government cannot meet its burden either by sweeping, unsubstantiated speculation or by suggesting some lesser form of gratitude or access qualifies. See *Republican Nat'l Comm.*, 698 F. Supp. 2d 150, 158 (D.D.C. 2010). Nor can it meet its burden of establishing a real *quid pro quo* corruption risk by either fabricating such a risk or clinging to an outdated rationale, broadly asserting that individuals can circumvent contribution limits simply because it was possible almost forty years ago.

1. The 1976 FECA Amendments Rectified Any Circumvention Risk

Buckley held that only "large contributions" in separate donations trigger a quid pro quo corruption risk. 424 U.S. at 26. Because individuals can now contribute only $5,000 to any PAC per year, there can be no anti-corruption interest justifying aggregate limits unless it is likely that these base limits can be circumvented. See *id.* Such circumvention would entail "contribut[ing] massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." *Id.* at 38.

In 1976, *Buckley* considered and upheld the single ceiling limit in effect at the time as a justifiable means

of preventing individuals from evading base contribution limits. *Buckley*, 424 U.S. at 38. But the Buckley Court was then considering a different law—one under which circumvention was entirely possible. See *id.* In direct response to the Buckley Court's circumvention concerns, Congress amended the FECA in 1976, enacting a number of measures directly targeted towards preventing the Court's feared evasion of contribution limits. Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976). The 1976 Amendments were thus specifically intended to limit additional methods of circumventing contribution limits —methods that the prior version of FECA had not addressed. *See generally* McCutcheon Brief at 40-43; RNC Brief at 19-23.

Accordingly, as even the lower court was forced to acknowledge, the amended FECA "include[d] a number of provisions designed to prevent evasion of the various [base] limits." *McCutcheon v. FEC,* 893 F. Supp. 2d 133, 136 (D.D.C. 2012) (three-judge court). Specifically, to eliminate the *Buckley* Court's apprehension regarding "massive" contributions, the Amendments implemented a new $5,000 per year limit on contributions by a person to any PAC. Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976); 2 U.S.C. § 441a(a)(1). The legislative history shows these new contribution limits for PACs were meant to "restrict . . . circumvent[ion]" of contribution limits, including by the proliferation of PACs that "appear to be separate entities pursuing their own ends, but are actually a means for advancing a candidate's campaign." See *California Medical Association v. FEC*, 453 U.S. 182, 198 n. 18 (1981) ("*CalMed*").

As additional assurance against the potential for circumvention, the 1976 Amendments added the nonproliferation provisions—a prophylactic measure designed specifically to prevent evasion of base contribution limits. *Id.* Finally, the Amendments also provided that all PACs sponsored by the same organization or individual would henceforth be treated as "affiliated" and held to a single contribution limit. Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976); 2 U.S.C. § 441a(a)(5).

Thus, the 1976 Amendments easily remedied any potential for circumventing base contribution limits, short of illegal earmarking. Quite simply, individuals now cannot lawfully evade the aggregate limit for PACs, and have been similarly unable to do so since 1976. The sole rationale for initially upholding the aggregate limits in Buckley has simply disappeared. *Buckley* at 38. Even the lower court readily conceded, "it is clear that contributing a large amount of money does not ipso facto implicate the government's anticorruption interest." 893 F. Supp. 2d at 139. Thus, the lower court dismissed the FEC's argument that large contributions "could easily exert a corruption influence" or an "appearance of corruption" as "sweep[ing] too broadly." *Id.*

Nevertheless, perhaps because the government failed to meet its burden of establishing a circumvention risk on its own, the lower court was forced to *sua sponte* offer several farfetched contingent scenarios where circumvention of base limits could somehow potentially occur by an individual contributing a large single check to joint fundraising party committees, which in turn could give collectively

their base limits to a single candidate. *Id.* at 140. But even in this unrealistic scenario, the only harm the lower court identified was the expression of "gratitude" to the contributor. *Id.* However, as will be discussed *infra*, this Court stated that eliminating such "gratitude" is not a compelling governmental interest: the only compelling government interest is eliminating *quid pro quo* corruption which can occur only with introducing or voting on legislation. *Citizens United*, 558 U.S. at 359-60. Regardless of the lower court's imaginative but dubious contingent scenarios, none of them actually involved PACs—nor could they, given the anti-conduit measures Congress enacted in its post-Buckley 1976 Amendments. PACs cannot transfer unlimited funds to other PACs.

Moreover, the government's suggestion that imposing aggregate limits on an individual's contributions to PACs is a justifiable means of preventing the corruption of candidates is bereft of logic, because there are no corresponding aggregate limits on contributions from PACs to candidates. If Congress did not see any potential for corruption with unlimited aggregate base contributions by a single PAC to federal candidates who exercise legislative powers, there cannot be potential for corruption with unlimited aggregate base contributions from individuals to PACs that do not exercise legislative powers. Indeed, one is hard-pressed to find a rational basis for this distinction, let alone one that survives exacting or strict scrutiny.

The law also allows PACs and individuals to engage in "bundling," whereby smaller base limit contributions to a candidate are solicited and amassed and then

turned over to the candidate in one lump sum under the fiction that the huge contribution is not coming from the bundler, but instead collectively from all the small donors. Entertainers who have political agendas are also free to engage in a form of bundling for their favorite candidate. They perform at concerts where individual attendees contribute a relatively small amount but the total amount raised exceeds tens of thousands of dollars, if not millions. For example, in 2008, Hillary Clinton raised $2.5 million at a single concert by Elton John.[3] Surely, there is significant "gratitude" bestowed on such bundlers and performers. This reality further undermines the government's alleged compelling governmental interest in imposing aggregate limits on individual contributions to PACs.

2. Any Other Government Interest Is Constitutionally Impermissible

With the risk of corruption rectified and lawful circumvention rendered impossible, the government no longer has a valid interest sufficient to restrict speakers' First Amendment rights. *See, e.g., Davis v. FEC*, 554 U.S. 724, 740-42 (2008); *Citizens United*, 130 S. Ct. at 904-11. Accordingly, the government's interest is most accurately framed as something less than *quid pro quo* corruption, or an attempt to equalize speech. But "contributors cannot be protected from the possibility that others will make larger contributions." *Citizens Against Rent Control* at 295.

---

[3] Chris Cillizza, Elton John Raises $2.5 Million for HRC, Wash. Post, April 10, 2008, http://voices.washingtonpost.com/thefix/fixcam/fixcam-an-elton-john-tribute.html.

Because "[d]emocracy is premised on responsiveness," *McConnell v. FEC*, 540 U.S. 93, 297 (2003), corruption necessitates an actual exchange of a "quid" for a "quo," and requires far more than mere receptiveness or even actual action. Thus, influence over or access to elected officials does not amount to corruption. *Citizens United*, 558 U.S. at 359. Similarly, "[i]ngratiation and access. . . . are not corruption." *Id.* at 360. Nor is "gratitude" a "constitutionally cognizable form of corruption." *Republican Nat'l Comm.*, 698 F. Supp. 2d at 158; see also *McCutcheon v. FEC*, 893 F. Supp. 2d at 139. Although the lower court acknowledged "gratitude" is not enough to constrain constitutionally protected speech, it offered no other justifiable explanation—particularly relating to PACs—as to why this Court should uphold the aggregate limits.

Elected officials would not likely reserve even especial gratitude to an individual who contributed $5,000 to various disparate PACs, assuming some of these PACs, in turn, supported that official during his or her campaign. Thus, even if an elected official resolved to hunt down a prolific PAC contributor with the aid of a forensic accountant—an exceedingly difficult task compared to the easy identification of an individual who spent millions of dollars in independent expenditures and who surely deserves more gratitude—and even if that official were determined to "lay the wreath of gratitude" at the feet of such a contributor—such gratitude still would not constitute corruption. See *id.*

The lower court improperly rejected Appellants' argument that the aggregate limits effectively limited

an individual's contributions to only $85.29 per federal candidate in 2006, a limit much lower than the $400 limit rejected by this Court in *Randall v. Sorrell*, 548 U.S. 230, 253 (2006). *McCutcheon,* 893 F. Supp. 2d 133, 141 n.5. The lower court admitted that such a scenario may indeed be applicable if costly "direct mail were the only means" to reach citizens. *Id.* The lower court countered this argument by naively describing what it called a "simple example" that building a website "to reach a national audience is not any more expensive than building one to reach citizens of a single state." *Id.* But simply building a website does not "reach" anybody, let alone a national audience. Rather, consumers, voters, and contributors are the ones that must "reach out" to access the website for it to be effective. And the public only becomes aware of such a website is through an advertising campaign costing money—with more money resulting in a more effective campaign—that first "reaches out" to a target audience to familiarize them with the website. Thus, even the lower court's own example intended to refute Appellants' constitutional argument is itself akin to a costly direct mail campaign and falls flat.

B. Since No Valid Anti-Corruption Interest Exists, the Aggregate Limits Are Not Closely Drawn And Serve As An Unnecessary Prophylaxis

Ensuring political speech is most effectively shielded from government intrusion often necessitates applying "strict scrutiny" to the government restriction imposed. *Citizens United*, 558 U.S. at 340. Even the weaker "exacting scrutiny" traditionally reserved for base contribution limits to candidates, however, is

nonetheless a "rigorous standard of review." Buckley, 424 U.S. at 29. Thus, the Court may validate contribution limits only if the limits are "closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136 (quoting *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 162 (2003), overruled on other grounds by *Citizens United*, 130 S. Ct. at 913). Only one sufficiently important government interest remains: preventing quid pro quo corruption or its appearance. *Buckley*, 424 U.S. at 27. Similarly, this Court may allow "'significant interference' with protected rights of political association" but only if the government demonstrates an anti-corruption interest and employs means closely drawn to achieve that interest. *NAACP v. Button*, 371 U.S. 415, 438 (1963). "Unnecessary abridgment" of speech and associational freedoms must be avoided. *Buckley*, 424 U.S. at 25.

Here, the government has entirely failed to meet its burden of establishing any risk of corruption or its appearance necessary to justify the two aggregate limits in question. By imposing a series of prophylactic measures specifically aimed at preventing individuals from evading contribution limits, the 1976 Amendments to the Federal Election Campaign Act conclusively foreclosed any possibility of such circumvention—the sole justification the *Buckley* Court initially gave for upholding the overarching aggregate limit. See *Buckley*, 424 U.S. 1 at 38. With the prior circumvention risk rectified, the government's anti-corruption interest evaporates with respect to the aggregate limits. Because a regulation cannot be closely drawn to achieve such an invalid interest, the dual aggregate limits cannot be upheld even under lesser scrutiny. The aggregate limits thus serve no

valid purpose, and function only as an unnecessary, constitutionally infirm "prophylaxis upon prophylaxis." *WRTL*, 551 U.S. at 478-79. Not only do the aggregate limits fail the strict scrutiny test which should govern this case, but also they fail the intermediate exacting scrutiny test employed by the lower court, and arguably fail the rational basis test.

III. RESTRICTIVE AGGREGATE LIMITS DISPROPORTIONATELY IMPACT PACS AND COMPOUND THE HARMS OF A SKEWED CAMPAIGN FINANCE SYSTEM

A. The Aggregate Limits Hamper PAC Speech And Decrease Competition Of Ideas

The Founders built into our political system the presumption that more speech is better and that anyone or any group wishing to disseminate and advocate ideas should be welcomed into the "marketplace." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). First Amendment standards require protecting rather than stifling debate over political ideas. *Citizens United*, 558 U.S. at 327. Indeed, our political system would lose its vibrancy if political debate was not "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

However, the government has stifled political debate by restricting the ability of PAC speech relative to other political speakers. The current speech paradigm diminishes PACs' unique views to a greater degree than those of any other speakers. These

viewpoints are often unfiltered through the Washington, D.C. political class, which tightly controls the speech of parties and many candidates. The aggregate limits place a particularly heavy burden on PAC speech and political participation, because Congress did not adjust PAC contribution limits for inflation, as is the case for contributions to party and candidate committees. As a result, the aggregate limits stifle PAC speech in a particularly discriminatory and unconstitutional manner.

B. The Base Contribution Limits, Unadjusted For Inflation, Only Exacerbate The Harm

Overregulating contributions only perpetuates a "new evil," and as a result "a substantial amount of political speech [is driven] underground." *See Nixon v. Shrink Missouri*, 528 U.S. 377, 408 (2000). The current campaign finance regime additionally burdens PACs with two separate unconstitutional aggregate limits from individuals: the aggregate limit of $74,600 to all non-candidate committees, of which there is sub-aggregate limit of $48,600 to PACs and state and local party committees, the difference being $26,000 which is allowed to be contributed to national party committees. These dual limits hamper PACs by restricting its base contribution limits that are not indexed to account for inflation, exacerbating the harm to PAC speech and association rights. In conjunction, these factors serve to diminish the impact of PAC voices.

The dual aggregate limits restrict a PAC's ability to accept even the already relatively low contributions.

Under the base contribution limits, an individual may contribute up to $5,000 per year to any PAC, and $10,000 per year to a state party committee. 2 U.S.C. § 441a(a)(1)(C)-(D). As noted, the biennial aggregate limit on contributions to these non-candidate, non-national-party committees is $48,600, 2 U.S.C. § 441a(a)(3)(B), and these contributions count against the $74,600 biennial limit on contributions to non-candidate committees. 2 U.S.C. § 441a(a)(3)(B). Thus, while the base contribution limits alone would permit an individual to contribute $5,000 per year to all PACs with whom that individual desires to associate, the two aggregate limits operate to preemptively prohibit this: under no circumstance can the would-be contributor fully associate with more than nine PACs.[4]

As a result of this restriction, the current system effectively bars TPLF and other PACs from receiving desired funds from, and associating with, willing contributors. See also 2 U.S.C. § 441a(f) (prohibiting PACs from knowingly receiving contributions in excess of the aggregate limits). It necessarily follows that, although PACs *may* make unlimited aggregate contributions to candidates, *see* 2 U.S.C. § 441a(a)(1)-(8), these PACs can contribute only those funds they receive. But "virtually every means of communicating ideas in today's mass society requires the expenditure

---

[4] Assuming an individual refrained from contributing to state party committees, the $48,600 limit still prohibits that individual from contributing the full lawful amount of $5,000 to more than nine PACs. *See* 2 U.S.C. § 441a(a)(3)(B). If an individual contributed the maximum amount of $10,000 to a state party committee, that individual would be limited to making full contributions to only seven PACs. *See id.*

of money." *Buckley*, 424 U.S. at 19. Thus, the aggregate limits do not merely circumscribe individuals' speech and association rights, but also operate to limit PAC spending, foreclosing PACs' ability to contribute unique, specific views to the public political discourse.

And this harm is compounded because the current system does not index contribution limits to PACs to account for inflation. As a result, PAC speech declines biennially in proportion to that of candidates and national parties. An individual may contribute a maximum amount of $5,000 to any PAC in a calendar year. 2 U.S.C. § 441a(a)(1)(C). Because this base limit is not indexed for inflation, it has remained the same since Congress first instituted the limit in 1976. *See* 2 U.S.C. § 441a(c)(1); Pub. L. 94-283, Title I, 90 Stat. 486 (May 11, 1976). In contrast, an individual may give $2,600 to a candidate per election, and up to $32,400 to a national party committee per calendar year. 2 U.S.C. § 441a(a)(1)(A)-(B). Since 2002, when Congress enacted BCRA, these limits have been increased biennially to account for inflation. 2 U.S.C. § 441a(c)(1). Thus, while the current campaign finance system permits candidates and national party committees to receive more money to fund their desired speech, PACs receive comparatively much less. There is no rational, let alone compelling, government interest in this asymmetric restriction. Congress may not value the speech of some favored group over others but must instead treat all speakers equally and allow the marketplace of ideas (and ultimately the people) to decide the speech's value. "The identity of the speaker is not decisive in determining whether speech is protected." *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion).

"By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker's voice." *Citizens United*, 558 U.S. at 340-41. Here, the government is following this unconstitutional path by weakening PACs' right to speak to the benefit of other political speakers. As described *supra*, PACs represent entirely unique interests, and thus provide all individuals across the political spectrum a means of banding together to advocate distinct viewpoints. But the vibrancy of PAC speech in the national political debate is handicapped under this outdated standard.

CONCLUSION

The Court should regard the aggregate limits with respect to PACs as a constitutionally unjustifiable blunderbuss broadly aimed at the vague, looming specter of corruption from "too much" money in the aggregate in the political system rather than as a law narrowly tailored to address the impact of single contributions from individuals to single candidates. "The First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v Nat'l Fed. Of the Blind*, 487 U.S. 781, 795 (1988). Here, the aggregate limits do not simply sacrifice speech for efficiency; rather, the limits sacrifice valuable political speech and association for no reason at all.

For all the foregoing reasons and those provided by the Appellants, *amici* submit that this Court should reverse the judgment of the three-judge district court.

Respectfully submitted,

Paul D. Kamenar
Counsel of Record
Coolidge Reagan Foundation
1629 K Street, N.W., Suite 300
Washington, D.C. 20006
paul.kamenar@gmail.com
(202) 603-5397

Counsel for *Amici Curiae*

Dated: May 13, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 13 2013
OFFICE OF THE CLERK

No. 12-536

In the Supreme Court of the United States

SHAUN MCCUTCHEON AND REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellees,

On Appeal from the United States District Court for the District of Columbia

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND THE MEDIA INSTITUTE

IN SUPPORT OF APPELLANTS

Thomas E. Hogan
Baker Hostetler LLP
Washington Square
1050 Connecticut Ave., NW
Washington, DC 20036
P: 202-861-1577
thogan@bakerlaw.com

J. Joshua Wheeler*
Clayton N. Hansen
The Thomas Jefferson Center for the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
P: 434-295-4784
jjw@tjcenter.org

*Counsel of Record for *Amici Curiae*

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

DISCUSSION 3

I. The Aggregate Limit on Contributions to Candidates Should Be Subject to Strict Scrutiny 3

A. Speech in the Electoral Context Is Traditionally Accorded the Highest Protection 4

B. The Aggregate Limit on Contributions to Candidates Imposes a Significant Burden on Core Political Speech by Prohibiting Individuals from Engaging in The Symbolic Act of Contributing to Their Preferred Candidates 6

C. The Aggregate Contribution Limit Hinders the First Amendment Right to Associate . 8

II. The Aggregate Contribution Limit is not Narrowly Tailored to Combat Electoral Corruption 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases	Pages
Am. Broad. Co., Inc. v. Blackwell, 479 F. Supp. 2d 719 (S.D. Ohio 2006)	4
Brown v. Hartlage, 456 U.S. 45 (1982)	5
Buckley v. Valeo, 424 U.S. 1 (1976)	passim
Burson v. Freeman, 504 U.S. 191 (1992)	4
Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010)	10
Colo. Republican Fed. Campaign Comm'n v. Fed. Election Comm'n, 518 U.S. 604 (1996)	8, 10
Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008)	5
Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986)	5
Kusper v. Pontikes, 414 U.S. 51 (1973)	8
Lincoln Club of Orange Cnty. v. City of Irvine, 292 F.3d 934 (9th Cir. 2002)	5
McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003)	6

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 5

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 4

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 4

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 6, 8, 9

Randall v. Sorrell, 548 U.S. 230 (2006) 8

Republican Party of Minn. v. White, 536 U.S. 765 (2002) 4

Rickert v. Pub. Disclosure Comm'n, 168 P.3d 826 (Wash. 2007) 5

Roth v. United States, 354 U.S. 476 (1957) 4

Schirmer v. Edwards, 2 F.3d 117 (5th Cir. 1993) 4

Shelton v. Tucker, 364 U.S. 479 (1960) 8

SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686 (2010) 10

Other Authorities

U.S. Const. amend. I ..... passim

Federal Elections Campaign Act (FECA)
2 U.S.C § 441a(3)(A) ..... passim

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

The Media Institute is an independent, nonprofit research organization located in Arlington, Virginia. Through conferences, publications and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, a competitive communications industry and journalistic excellence. The Institute has participated as *amicus curiae* in numerous court proceedings, including cases before the United States Supreme Court and federal courts of appeal.

---

[1] This *amici curiae* brief is filed with the written consent of the parties. A copy of the consent of the Federal Election Commission has been filed with the Clerk of Court for the Supreme Court of the United States. The written consents of Shaun McCutcheon and the Republican National Committee are enclosed.

SUMMARY OF ARGUMENT

Laws that prevent individuals from advocating for and through their preferred candidates for public office should be subject to this Court's strictest scrutiny. Political speech is at the core of the First Amendment's sphere of protected speech. The center of that core is political speech in the context of elections. Elections are *the* essential political activity in a representative democracy. This Court has traditionally subjected laws that significantly burden political speech in the election context to strict scrutiny review. In *Buckley v. Valeo*, however, a lesser degree of scrutiny was applied to campaign contribution limits. 424 U.S. 1 (1976). This Court should repudiate that aberration, at least with respect to laws imposing an aggregate limit on campaign contributions.

Individuals have political interests that are not only local or regional but also national in scope. An aggregate contribution limit is a significant burden on core political speech in that it prohibits individuals from expressing support for, and associating with, all of their preferred candidates through contributions at the per-candidate contribution limit. The Federal Elections Campaign Act (FECA) prohibits individuals from contributing to more than 18 candidates at the per-candidate contribution limit in any two-year period. 2 U.S.C § 441a(3)(A). This aggregate limit on contributions to candidates is not narrowly tailored to further the government's anti-corruption interest. With or without the aggregate limit, individuals' every

contribution will still be within the range that Congress has found does not create a serious risk of eliciting an illicit political favor from the recipient. Furthermore, the risk that a contributor can corrupt a particular candidate by contributing to more than 17 *other* candidates at the per-candidate limit is remote. Because contributions at the per-candidate contribution limit do not create a serious risk of *quid pro quo* corruption, FECA's limit on the number of candidates to whom an individual may make such a contribution cannot survive strict scrutiny review.

DISCUSSION

I. The Aggregate Limit on Contributions to Candidates Should Be Subject to Strict Scrutiny

FECA's aggregate contribution limit should be subject to strict scrutiny review because (a) the aggregate limit constitutes a restriction on speech in the electoral context—a category traditionally afforded heightened protection, (b) the aggregate limit significantly restricts political speech by limiting an individual's ability to engage in the symbolic act of contributing to preferred candidates, and (c) the aggregate limit hinders an individual's First Amendment right to associate with the candidates of his or her choosing.

A. Speech in the Electoral Context Is Traditionally Accorded the Highest Protection.

The First Amendment's protection of speech is at its zenith in the context of political activity. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("The constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office."). This Court has interpreted that protection broadly, reflecting a "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Accordingly, "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957), this Court has traditionally subjected the restriction of such speech to strict scrutiny. These constitutionally suspect laws include regulations concerning electioneering and other activity around polling places,[2] regulations of speech by political candidates,[3] restrictions on

---

[2] *See Burson v. Freeman*, 504 U.S. 191 (1992) (applying strict scrutiny to statute prohibiting solicitation of votes within 100 feet of polling place); *see also Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) (applying strict scrutiny to Louisiana statute proscribing campaign activity within 600 feet of polling places); *Am. Broad. Co., Inc. v. Blackwell*, 479 F. Supp. 2d 719 (S.D. Ohio 2006) (applying strict scrutiny to Ohio restrictions against conducting exit polling within 100 feet of a polling place).

[3] *See Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (applying strict scrutiny to regulation preventing judicial

leafleting activities,[4] and regulations concerning candidate self-funding and issue funding.[5]

The application of strict scrutiny in these circumstances reflects the First Amendment norm that political speech is essential to a free and robust political process, and that laws restricting such speech must be narrowly tailored to a compelling interest lest "[t]he free exchange of ideas [which] provides special vitality to the process traditionally at the heart of American constitutional democracy," be inhibited. *Brown*, 456 U.S. at 53.

---

candidates from announcing their views on disputed legal or political issues); *Brown v. Hartlage*, 456 U.S. 45 (1982) (applying strict scrutiny to regulation prohibiting candidates from offering material benefits to voters in consideration for their votes); *see also Rickert v. Pub. Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007) (en banc) (applying strict scrutiny to statute prohibiting candidates from sponsoring political advertisements containing falsities).

[4] *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (stating that "handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression").

[5] *See Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008) (applying strict scrutiny to regulation treating self-financed candidates differently from those financed by other means); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (applying strict scrutiny to regulation prohibiting corporations from endorsing candidates with advertisements); *see also Lincoln Club of Orange Cnty. v. City of Irvine*, 292 F.3d 934 (9th Cir. 2002) (applying strict scrutiny to city ordinance limiting the amount of contributions that a committee could receive from a single source during an election campaign).

FECA's aggregate limit on contributions to candidates should receive scrutiny that is no less stringent than these other suspect laws burdening core speech and associational rights. As Justice Kennedy observed in *Nixon v. Shrink Missouri Government PAC*, "[a]midst an atmosphere of skepticism" about the role of campaign contributions in politics, "it hardly inspires confidence for the Court to abandon the rigors of our traditional First Amendment structure." 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting).

B. The Aggregate Limit on Contributions to Candidates Imposes a Significant Burden on Core Political Speech by Prohibiting Individuals from Engaging in The Symbolic Act of Contributing to Their Preferred Candidates.

Although this Court applies strict scrutiny to its review of expenditure limits, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 136 (2003), in *Buckley* it reasoned that contribution limits are meaningfully distinguishable from expenditure limits because they impose only a marginal restriction on the donor's freedom of speech, stating as follows:

> The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. . . . A

> limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

424 U.S. at 21. This purported distinction between contribution and expenditure limits, however, does not hold up as applied to aggregate contribution limits, as distinct from limitations on per-candidate contribution limits. Aggregate contribution limits function as a cap on the number of candidates for whom an individual may make "the symbolic expression of support" that the *Buckley* Court acknowledged as essential political speech and, thus, diminish an individual's "quantity of communication" in the election context. *Id.* The result is the absolute suppression of one's political speech, not merely a restraint on the intensity of one's speech.

Nor can contribution limits (either aggregate or per-candidate limits) be meaningfully distinguished from expenditure limits on the basis that financial contribution is a form of indirect speech. There is no meaningful difference between commissioning and contracting for the dissemination of an advertisement in support of a candidate, and supporting the candidate by providing funds to do the same. The *Buckley* Court's reliance on a

distinction between "contributions from expenditures based on the presence of an intermediary between a contributor and the speech eventually produced . . . is misguided, given that '[e]ven in the case of direct expenditure, there is usually some go-between that facilitates the dissemination of the spender's message.'" *Randall v. Sorrell*, 548 U.S. 230, 266 (2006) (Alito, J., dissenting) (quoting *Colo. Republican Fed. Campaign Comm'n v. Fed. Election Comm'n*, 518 U.S. 604, 638-39 (1996) (opinion of Thomas, J.)).

Furthermore, the contribution limits prevent individuals from choosing how best to disseminate their message and "an individual's choice of that mode of expression" is itself entitled to protection. *Nixon*, 528 U.S. at 417 n.5 (2000) (Thomas, J., dissenting).

C. The Aggregate Contribution Limit Hinders the First Amendment Right to Associate.

FECA's aggregate contribution limit also significantly burdens core associational rights. The right to associate is a "basic constitutional freedom," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973); that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). FECA's burden on that right is self-evident—once an individual has exhausted his or her biennial aggregate limit, FECA outright prohibits any association with additional candidates through

financial contributions to their campaigns during that two-year period.[6]

The mere fact that the aggregate contribution limit does not foreclose every avenue of political association (*e.g.*, handing out leaflets on the street) should not cause this Court to apply lesser scrutiny. As Justice Thomas noted in his *Nixon* dissent, this Court has "rejected the notion that a law will pass First Amendment muster simply because it leaves open other opportunities." 528 U.S. at 418 n.6 (Thomas, J., dissenting) (collecting cases).

II. The Aggregate Contribution Limit is not Narrowly Tailored to Combat Electoral Corruption

In enacting FECA, Congress determined that contributions at the per-candidate limit do not present a serious risk of corrupting the recipient. The risk that a contributor will successfully elicit an illicit political favor from a particular candidate by contributing at the per-candidate limit to *other* candidates is, therefore, remote. Thus, the burden on core political speech imposed by the aggregate limit is disproportionate to the government's interest

---

[6] FECA's aggregate limit on contributions to candidates also infringes the associational rights of the candidates themselves, who wish to receive contributions. A cap on the number of candidates an individual may support is perhaps most threatening to third-party candidates, who, as the *Buckley* Court observed, "are more vulnerable to falloffs in contributions." 424 U.S. at 71.

in avoiding *quid pro quo* corruption, which is the only governmental interest "sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech." *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 692 (2010) (internal quotation marks omitted); *see also Citizens United v. Fed'l Election Comm'n*, 558 U.S. 310 (2010) (rejecting nebulous notions of some "appearance of corruption," and looking instead to its historical understanding of the "hallmark of corruption . . . financial *quid pro quo*: dollars for political favors").

In the absence of a manifest risk of *quid pro quo* corruption, FECA's limit on the number of candidates to whom an individual may contribute at the per-candidate limit cannot survive strict scrutiny review. "'Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent.'" *Colo. Republican Fed. Campaign Comm'n*, 518 U.S. at 642 (Thomas, J., concurring in judgment and dissenting in part) (quoting Brief for Appellants in *Buckley*, pp. 117-18).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court hold that the Federal Elections Campaign Act's aggregate limit on contributions to candidates is unconstitutional.

Respectfully submitted,

/s/ J. Joshua Wheeler

Thomas E. Hogan
Baker Hostetler LLP
Washington Square
1050 Connecticut Ave., NW
Washington, DC 20036
P: 202-861-1577
thogan@bakerlaw.com

J. Joshua Wheeler*
Clayton N. Hansen
The Thomas Jefferson Center for the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911
P: 434-295-4784
jjw@tjcenter.org

*Counsel of Record for *Amici Curiae*

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUL 24 2013

No. 12-536

IN THE

Supreme Court of the United States

SHAUN MCCUTCHEON, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE REPRESENTATIVES CHRIS VAN HOLLEN AND DAVID PRICE IN SUPPORT OF APPELLEE

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Ave., NW
Washington, DC 20036

DONALD J. SIMON
SONOSKY, CHAMBERS,
SACHSE, ENDRESON
& PERRY, LLP
1425 K Street, NW
Suite 600
Washington, DC 20005

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6800
seth.waxman@wilmerhale.com

ROGER M. WITTEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE AGGREGATE CONTRIBUTION LIMITS AT ISSUE IN THIS CASE ARE JUST THAT—*CONTRIBUTION* LIMITS—AND MUST BE JUDGED ACCORDINGLY 4

II. THE AGGREGATE CONTRIBUTION LIMITS ARE CLOSELY DRAWN TO COUNTER REAL THREATS OF CORRUPTION 11

A. This Court Has Consistently Recognized That Contribution Limits Serve The Important Interests Of Preventing Corruption, The Appearance Of Corruption, And Circumvention 11

B. Aggregate Contribution Limits Prevent Fundraising Practices That Carry Inherent Risks Of Corruption And Circumvention 12

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Page(s)

Arizona Free Enterprise Club's Freedom Club PAC v. *Bennett*, 131 S. Ct. 2806 (2011) 4

Buckley v. *Valeo*, 424 U.S. 1 (1976) ..... *passim*

California Democratic Party v. *Jones*, 530 U.S. 567 (2000) 21

California Medical Ass'n v. *FEC*, 453 U.S. 182 (1981) 5, 8

Citizens United v. *FEC*, 558 U.S. 310 (2010) ..... *passim*

Colorado Republican Federal Campaign Committee v. *FEC*, 518 U.S. 604 (1996) 20

FEC v. *Beaumont*, 539 U.S. 146 (2003) 3, 4, 7, 9, 10

FEC v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) 4, 11, 22, 23, 24

FEC v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) 5

Green Party of Connecticut v. *Garfield*, 616 F.3d 189 (2d Cir. 2010) 10

McConnell v. *FEC*, 540 U.S. 93 (2003) ..... *passim*

Nixon v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000) 7

Ognibene v. *Parkes*, 671 F.3d 174 (2d Cir. 2011) 9

Preston v. *Leake*, 660 F.3d 726 (4th Cir. 2011) 10

Randall v. *Sorrell*, 548 U.S. 230 (2006) 5, 7, 26

TABLE OF AUTHORITIES—Continued

Page(s)

Republican National Committee v. *FEC*, 130 S. Ct. 3544 (2010) 7, 22

Republican National Committee v. *FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) 7

Tashjian v. *Republican Party of Connecticut*, 479 U.S. 208 (1986) 21

United States v. *Danielczyk*, 683 F.3d 611 (4th Cir. 2012) 9

STATUTES AND REGULATIONS

2 U.S.C.
§ 432(e)(3)(B) 20
§ 441a(a)(4) 19
§ 441a(a)(8) 23
§ 441i(e)(1)(A) 12

Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431 *et seq.* 12

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 19

11 C.F.R. § 109.33 20

OTHER AUTHORITIES

Center for Responsive Politics, *McCutcheon vs FEC*, http://www.opensecrets.org/overview/mccutcheon.php (last visited July 24, 2013) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Brudnick, Ida A., Congressional Research Service, *Congressional Salaries and Allowances* (2013), *available at* http://www.senate.gov/CRSReports/crs-pub-lish.cfm?pid='0E%2C*PL%5B%3D%23P%20%20%0A 25

FEC, *2013 Coordinated Party Expenditure Limits*, http://www.fec.gov/info/charts_441ad_2013.shtml (last visited July 24, 2013) 20

FEC, *2012 Coordinated Party Expenditure Limits*, http://www.fec.gov/info/charts_441ad_2012.shtml (last visited July 24, 2013) 20

Knott, Alex, *Politicians Create Record Number of Joint Fundraising Committees*, Roll Call (Sept. 17, 2010), http://www.rollcall.com/news/-49934-1.html?pg=1 18

Team Boehner, *Contribute*, https://www.geticontribute.com/teamboehner (last visited July 24, 2013) 17

U.S. Census Bureau, *State & County QuickFacts*, http://quickfacts.census.gov/qfd/states/00000.html (last visited July 25, 2013) 25

INTEREST OF AMICI CURIAE[1]

Chris Van Hollen is the United States Representative for the Eighth Congressional District of the State of Maryland and the ranking Democrat on the House Budget Committee. From 2007 to 2011, Representative Van Hollen also served as Chairman of the Democratic Congressional Campaign Committee.

David Price is the United States Representative for the Fourth Congressional District of the State of North Carolina. He serves on the House Appropriations Committee and is the ranking Democrat on the Homeland Security Appropriations Subcommittee.

As federal officeholders, candidates, and leaders of their political party, amici are directly affected by the aggregate contribution limits at issue in this case. Amici believe strongly in the necessity of recognizing the crucial role that political parties play in our system of democratic representative government. At the same time, they recognize the critical importance of limits on contributions to political parties and candidates in preserving our system against the reality and appearance of corruption. Aggregate limits on contributions are essential to achieving the latter goal while fully accommodating the former. Amici submit this brief because they believe that their perspective may be of assistance to the Court as it considers the issues in this case.

---

[1] Written consents to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case starkly poses the question whether the competition for the massive individual contributions that would be permitted without aggregate contribution limits would threaten to create the reality or appearance of corruption. This Court's decisions leave no doubt that the answer is yes. Striking down these limits would create obvious possibilities for even the most blatant forms of corruption: solicitations for hundreds of thousands or millions of dollars, creating the opportunity for transactions exchanging contributions for anticipated political favors from officeholders. While there may be disagreement about the precise boundaries of corruption and its appearance, it has long been settled that such arrangements, at least, fall within its core.

Unlike expenditure limits, contribution limits impose "only a marginal restriction upon the contributor's ability to" communicate, and are thus subject to a less demanding standard of review. *Buckley* v. *Valeo*, 424 U.S. 1, 20 (1976) (per curiam). Here, the aggregate contribution limits that Congress enacted serve the important interest in curtailing actual and apparent corruption. Absent those limits, extremely large contributions to party committees and affiliated candidates would directly threaten to foster the reality or appearance of corrupt arrangements resulting in officeholders beholden to their large financial backers.

In particular, elimination of aggregate limits would allow candidates and officeholders to use joint fundraising committees to solicit six- and seven-figure donations from single donors. Regardless of the use to which the contributions were ultimately put, such transactions would create the opportunity for, and the

appearance of, the most blatant forms of quid quo pro corruption.

Large donations to parties and affiliated candidates, moreover, benefit candidates in ways likely to foster corruption directly as well as through the circumvention of the base candidate contribution limits that are the most fundamental check on corruption. Parties and their candidates are part of a common political enterprise with shared interests. Party committees can freely transfer money among themselves and spend it in a variety of ways that directly benefit candidates. Because experience demonstrates that parties and donors find ways to target funds for particular candidates that prohibitions on "earmarking" can neither detect nor prevent, eliminating aggregate limits would enable donors to give massive donations with the expectation that they would be spent to support particular candidates. And, even when those very large donations were used to support the party more broadly, they would still have been provided in response to solicitations from the candidates and officeholders who make up the party and its leadership. Either way, such inflated donations would result in officeholders and party leaders beholden to their extraordinary financial patrons.

The important—indeed, compelling—governmental interest in preventing actual or apparent corruption provided ample basis to uphold individual and aggregate contribution limits in *Buckley*, 424 U.S. at 23-29, 38, the ban on corporate contributions in *FEC* v. *Beaumont*, 539 U.S. 146 (2003), and the soft money ban in *McConnell* v. *FEC*, 540 U.S. 93, 132-189 (2003), and it provides more than sufficient basis to uphold the aggregate contribution limits at issue here.

ARGUMENT

I. THE AGGREGATE CONTRIBUTION LIMITS AT ISSUE IN THIS CASE ARE JUST THAT—*CONTRIBUTION* LIMITS—AND MUST BE JUDGED ACCORDINGLY

A foundational principle of this Court's modern campaign finance precedent is the distinction between limits on expenditures and limits on contributions. *See, e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 19-22 (1976) (per curiam); *McConnell* v. *FEC*, 540 U.S. 93, 120, 137 (2003), *overruled in other part by Citizens United* v. *FEC*, 558 U.S. 310 (2010). Under the approach consistently applied by this Court, contribution limits are not subject to the same strict scrutiny as expenditure limits. Instead, contribution limits are constitutional so long as they are "'closely drawn' to serve a 'sufficiently important interest.'" *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806, 2817 (2011). As the Court explained in *Buckley*, unlike "a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communications." 424 U.S. at 20-21. Accordingly, the courts have long applied a "less rigorous standard of review" to contribution limits. *McConnell*, 540 U.S. at 137.

The significance of this distinction is borne out by this Court's holdings. Although the Court has at times struck down expenditure limits, *see, e.g.*, *Citizens United*, 558 U.S. at 365-366; *Buckley*, 424 U.S. at 58-59, it has uniformly upheld federal statutory limits on contributions to candidates, political parties, and political committees, *see McConnell*, 540 U.S. at 142-185; *FEC* v. *Beaumont*, 539 U.S. 146, 149 (2003); *FEC* v. *Colora-*

do Republican Fed. Campaign Comm., 533 U.S. 431, 465 (2001) (*Colorado II*); *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 201 (1981); *Buckley*, 424 U.S. at 24-36.[2] As this Court explained in *Citizens United*, "contribution limits, ... unlike limits on independent expenditures, have been an accepted means to prevent ... corruption." 558 U.S. at 359 (citation omitted).

This distinction stems from fundamental differences between the two types of restrictions. The Court has subjected expenditure limits to strict scrutiny because they are direct restrictions on speech. *See Citizens United*, 558 U.S. at 339; *see also FEC* v. *Wisconsin Right To Life, Inc.*, 551 U.S. 449, 464 (2007) (opinion of Roberts, C.J.). Thus, the Court has described limits on campaign expenditures as "direct and substantial restraints on the quantity of political speech" that "limit political expression 'at the core of our electoral process and of ... First Amendment freedoms,'" *Buckley*, 424 U.S. at 39, and it has applied a correspondingly stringent standard of review.

By contrast, the Court has long emphasized that because "the transformation of contributions into political debate involves speech by someone other than the contributor," contribution limits "entail[] only a marginal restriction" on speech:

> A limitation on the amount of money a person may give to a candidate or campaign organiza-

---

[2] The *only* case in which this Court has struck down a contribution limit is *Randall* v. *Sorrell*, 548 U.S. 230 (2006), which struck down *state* contribution limits of as little as $200 per two-year cycle on the grounds that they effectively "prevent[ed] challengers from mounting effective campaigns against incumbent officeholders." *Id.* at 249 (opinion of Breyer, J.). Appellants have raised no such concern here.

> tion thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Buckley, 424 U.S. at 20, 21. Moreover, "[t]he quantity of communication by the *contributor* does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21 (emphasis added). Accordingly, "contribution limits impose serious burdens on free speech *only* if they are so low as to 'preven[t] *candidates* and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (emphases added).

Contributions can also be a means of exercising associational rights because they can "serve[] to affiliate a person with a candidate." *Buckley*, 424 U.S. at 22. However, a contributor's ability to associate with a candidate or organization is not fundamentally altered based on the size of the contribution. And although contributions "enable[] like-minded persons to pool their resources in furtherance of common political goals," the burden of contribution limits is limited because they still "allow associations 'to aggregate large sums of money to promote effective advocacy.'" *McConnell*, 540 U.S. at 136. A contribution limit will thus be sustained if it is "'closely drawn' to match a 'suf-

ficiently important interest.'" *Beaumont*, 539 U.S. at 162 (quoting *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-388 (2000)).

The Court's opinions have consistently adhered to this understanding of contributions. Thus, in *Beaumont*, the Court reiterated that "[g]oing back to *Buckley* v. *Valeo*, restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." 539 U.S. at 161 (citation omitted). The Court made exactly the same point in *McConnell*, again emphasizing "the limited burdens [contribution restrictions] impose on First Amendment freedoms" and "adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided." 540 U.S. at 136, 137-138. In *Citizens United*, the Court again preserved what the Chief Justice referred to as "the careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech." 558 U.S. at 379 (Roberts, C.J., concurring); *see also Randall* v. *Sorrell*, 548 U.S. 230, 246-248 (2006) (opinion of Breyer, J.) (same); *id.* at 281-282, 284-285 (Souter, J., dissenting) (same). And in *Republican National Committee* v. *FEC*, 130 S. Ct. 3544 (2010), the Court summarily affirmed the holding of a three-judge district court that limits on contributions to national, state, and local political party committees remain subject to less rigorous scrutiny than expenditure limits, and are constitutional when subjected to that scrutiny. *See Republican Nat'l Comm.* v. *FEC*, 698 F. Supp. 2d 150, 156 (D.D.C. 2010).

As this Court recognized in *Buckley*, *aggregate* contribution limits are subject to the same level of scrutiny as base contribution limits. 424 U.S. at 38. Aggregate contribution limits implicate the same interests as do other contribution limits the Court has sustained, and there is accordingly no reason to apply a different standard of review. Indeed, because aggregate limits, if anything, operate *less* directly to affect a contributor's ability to associate with any particular candidate or committee, they also implicate First Amendment concerns less directly.

Appellants rightly do not contend that the aggregate contribution limits at issue here prevent them from directly expending money on speech, as did the expenditure limits struck down in *Buckley* and *Citizens United*. *See California Med. Ass'n*, 453 U.S. at 196 (holding that contributing funds to a political committee does not turn the committee's speech into the contributor's for First Amendment purposes). Of course, a contribution involves speech to the extent it serves as a "symbolic expression of support." *Buckley*, 424 U.S. at 21. But the aggregate limits at issue here do not prevent contributors from making that symbolic expression with respect to as many candidates as they wish. Instead, the aggregate limits affect only the *size* of such contributions, which has little significance to the speech right: As this Court has explained, the quantity of expression "does not increase perceptibly" with the amount of the contribution. *Id.* The aggregate limits at issue here therefore burden speech no differently than those upheld in this Court's previous cases.

Nor do the aggregate limits burden *association* in a different manner than other contribution limits sustained by this Court. McCutcheon concedes (at 25) that

aggregate limits do not directly restrict how many candidates contributors may associate with through contributions, but he protests that the aggregate limits may prevent giving the legal maximum to each candidate. But meaningful association does not require maximal support. And even if an aggregate limit imposes some theoretical outside limit on the number of candidates, parties, and political committees with whom a contributor can associate, the same was true of the $25,000 aggregate limit at issue in *Buckley*. 424 U.S. at 38. The Court nonetheless applied the same level of scrutiny to "this quite modest restraint upon protected political activity" as to the other contribution limits it sustained. *Id.* To the extent the aggregate limits here differ from the lower limit sustained in *Buckley* in terms of the number of candidates and organizations that can be supported, and the level of support allowed, those are merely differences in degree. "Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 30.

Ultimately, the *nature* of the act of contributing—and hence the interests it implicates—does not vary depending on whether it is restricted on an aggregate or per-recipient basis, and it is the nature of the activity restricted that determines the level of scrutiny. *Beaumont*, 539 U.S. at 162. In *Beaumont*, the Court upheld the longstanding statutory prohibition on corporate contributions—a prohibition far stricter than the aggregate limits at issue here. *See id.* at 149.[3] *Beau-*

---

[3] *Accord, e.g.*, *United States* v. *Danielczyk*, 683 F.3d 611, 617 (4th Cir. 2012) (upholding ban on corporate contributions under the *Buckley* standard as applied in *Beaumont*), *cert. denied*, 133 S. Ct. 1459 (2013); *Ognibene* v. *Parkes*, 671 F.3d 174, 194-197 (2d Cir.

mont held that the nature of the activity affected by the prohibition at issue in that case—contributing money to candidates, parties, and political committees—was the same as the activity affected by a contribution limit and hence bore the same relationship to First Amendment interests. *Id.* at 161-162. And because, in turn, "the level of scrutiny is based on the importance of the 'political activity at issue' to effective speech or political association," *id.* at 161, the same standard of review applied to the contribution prohibition in *Beaumont* as to the contribution limits in *Buckley*.

The limits at issue here apply to activity of exactly the same nature: Aggregate contribution limits limit contributions. The First Amendment interests they affect are the same interests affected by any other limit on contributions. The constitutional standard against which they must be judged is accordingly the one applicable to contributions. *See McConnell*, 540 U.S. at 139 (declining to apply strict scrutiny because the provisions at issue did not "burden[] speech" differently from any other contribution limit).

2011) (applying *Buckley* standard to uphold ban on contributions by non-corporate entities), *cert. denied*, 133 S. Ct. 28 (2012); *Preston* v. *Leake*, 660 F.3d 726, 732-735 (4th Cir. 2011) (applying *Buckley* standard to uphold ban on contributions by lobbyists); *Green Party of Conn.* v. *Garfield*, 616 F.3d 189, 198-199 (2d Cir. 2010) (applying *Buckley* standard to bans on contributions by government contractors and lobbyists), *cert. denied*, 131 S. Ct. 3090 (2011).

II. THE AGGREGATE CONTRIBUTION LIMITS ARE CLOSELY DRAWN TO COUNTER REAL THREATS OF CORRUPTION

A. This Court Has Consistently Recognized That Contribution Limits Serve The Important Interests Of Preventing Corruption, The Appearance Of Corruption, And Circumvention

In every case in which this Court has considered federal contribution limits, it has upheld those limits because they serve an interest the Court has always deemed sufficiently important to justify campaign finance regulation: preventing corruption and the appearance of corruption. Very large political contributions create both the risk that officeholders and potential officeholders will be tempted to forsake their public duties and the opportunity for corrupt bargains. They thus threaten to foster both actual corruption and, what may be just as damaging, its appearance. *Buckley*, 424 U.S. at 26-27; *accord Citizens United*, 558 U.S. at 345, 356-357.

These justifications suffice even though corrupt bargains would otherwise be illegal, both because the difficulty of unearthing and proving their existence means that "the scope of such pernicious practices can never be reliably ascertained," *Citizens United*, 558 U.S. at 356 (quoting *Buckley*, 424 U.S. at 27), and because "public awareness of the opportunities for abuse *inherent* in a regime of large individual financial contributions" may otherwise erode "'confidence in the system of representative Government ... to a disastrous extent,'" *Buckley*, 424 U.S. at 27 (emphasis added).

The government's anti-corruption interest is "sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits." *McConnell*, 540 U.S. at 144; *see also Colorado II*, 533

U.S. at 456 ("[A]ll members of the Court agree that circumvention is a valid theory of corruption."). Thus, *Buckley* upheld an aggregate contribution limit because it prevented donors from circumventing the base limits and "contribut[ing] massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38. "The limited, additional restriction on associational freedom imposed by the overall ceiling [was] thus no more than a corollary of the basic individual contribution limitation that we have found to be constitutionally valid." *Id.*

B. Aggregate Contribution Limits Prevent Fundraising Practices That Carry Inherent Risks Of Corruption And Circumvention

The aggregate contribution limits at issue here are likewise constitutional because they prevent a variety of fundraising practices that raise the precise concerns this Court has previously held to justify contribution limits.

1. Absent aggregate contribution limits, candidates and officeholders would be permitted to solicit massive donations to their parties and fellow candidates, explicitly and directly from their donors. Candidates and officeholders are allowed to solicit any contributions that "are subject to the limitations, prohibitions, and reporting requirements of" the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431 *et seq.* 2 U.S.C. § 441i(e)(1)(A). And candidates and parties often create joint fundraising committees to receive combined contributions from a single donor to be allocated, up to the applicable per-contribution limits for the relevant election cycles, to as many national,

state, and local party committees and candidates as possible. Without aggregate limits, such practices would easily allow candidates and officeholders to solicit and receive contributions that substantially exceed $1 million.

- Congressional leaders could form a joint fundraising committee soliciting the maximum contributions per cycle for their two national party campaign committees[4] ($64,800 each, for a total of $129,600), as well as the maximum per-cycle contributions for 435 House and 33 Senate candidates ($5,200 each, for a total of $2,433,600). The committee could solicit and receive amounts totaling $2,563,200 from a single donor.[5]

- A party's national leaders could join forces to solicit the maximum contributions per cycle for all three national party committees ($64,800 each, for a total of $194,400), all state party committees ($20,000 each, for a total of $1,000,000), and the party's presidential candidate and each of its House and Senate candidates ($5,200 each, for a total of $2,438,800). The grand total: $3,633,200.

- Presidential candidates (or candidates for other federal offices) and their parties could solicit the maximum contributions per cycle for their

---

[4] Those committees are the National Republican Senatorial Committee and the National Republican Congressional Committee, and the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee.

[5] Current contribution limits are collected in the government's brief (at 9-10).

> own campaign committees ($5,200), plus the maximum for the national party committees ($64,800 each, for a total of $194,400), plus the maximum for state party committees ($20,000 each, for a total of $1,000,000). The total amount such a candidate or committee could solicit from a single donor would be $1,199,600.

As this Court recognized in *McConnell*, the prospect of candidates soliciting and receiving multi-million dollar checks from donors creates both the risk of corruption and the appearance of corruption. To be sure, these funds might not all be expended directly on the candidate's own campaign. But this Court has not required a direct financial benefit to the candidate's own campaign committee to recognize the potential for corruption or its appearance when a contributor makes a large donation at a candidate's request. It is enough that the contribution benefits the party and its candidates, directly satisfying the request. Thus, in *McConnell*, seven Justices held that solicitation of very large contributions for national parties presented corruption concerns regardless of how those contributions were ultimately used. As the majority observed:

> Large ... donations [to parties or other organizations] at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.

McConnell, 540 U.S. at 182. Justice Kennedy, joined by Chief Justice Rehnquist, agreed, explaining that

"regulation of a candidate's solicitation of funds" "furthers a constitutionally sufficient" anti-corruption interest, even "if the funds are given to another," because "[t]he making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request)." *Id.* at 308 (Kennedy, J., concurring in judgment in part and dissenting in part). Thus, limiting the amounts candidates may raise for their parties, as well as other party candidates and organizations, "satisfies *Buckley*'s anticorruption rationale and the First Amendment's guarantee." *Id.*

McConnell also recognized more generally that "large ... contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used." 540 U.S. at 155. That candidates and officeholders may be obligated by contributions to their party, or to other candidates, is not surprising. "The national committees of the two major parties are both run by, and largely composed of, federal officeholders and candidates." *Id.* Those officeholders are tasked in significant part with raising money for the party and its candidates, and their future prospects for leadership posts and even electoral success are influenced by how well they perform that role. *Cf. id.* at 156 (citing evidence that "'political parties[] control the resources crucial to subsequent electoral success and legislative power'" and that "officeholders' reelection prospects are significantly influenced by attitudes of party leadership"). The electoral successes of the candidate's party, moreover, dictate whether the candidate, if elected, will serve in the majority or the minority in Congress. Such officeholders therefore stand to benefit from contributions to the party both directly, through party

spending, and indirectly, through their success at fundraising for and electing other candidates.

Eliminating FECA's aggregate limits on party and candidate contributions would effectively negate the interests served by the soft-money solicitation ban upheld in *McConnell* by once again allowing candidates and officeholders to seek extremely large contributions to benefit themselves, their parties, and their political allies. Past experience provides every reason to believe that parties and candidates would take advantage of this opportunity. During the soft-money period, when limits on contributions to political parties were bypassed through contributions not covered by FECA (because they were supposedly not for federal election purposes), the parties and their officeholders established joint fundraising committees to solicit FECA-limited contributions to the candidates together with limited hard-money or unlimited soft-money contributions to party committees. In the 2000 elections, the last in which soft-money contributions to the national parties were permitted, individual contributors made more than 500 soft-money contributions to Democratic or Republican party committees of at least $100,000.[6] Several made contributions of at least $1 million. The number of possible large donors today, and the amounts they would be willing to contribute, would undoubtedly be even higher, and if the parties and their candidates were once more permitted to tap them for amounts ex-

---

[6] The figures cited in the paragraph accompanying this footnote and the two that follow were compiled by the Center for Responsive Politics from FEC disclosure data. *See* Center for Responsive Politics, *McCutcheon vs FEC*, http://www.opensecrets.org/overview/mccutcheon.php (last visited July 24, 2013).

ceeding the current aggregate limits, they would certainly do so.

This conclusion is confirmed by the fact that parties and candidates have continued to operate joint fundraising committees up to the limits permitted by the soft-money ban and FECA's aggregate limits. Thus, in the 2012 presidential elections, both major-party presidential candidates operated joint fundraising committees called, respectively, the Obama Victory Fund and Romney Victory, which sought both contributions to the candidates' campaign committees and the maximum contributions to party committees permissible under the applicable aggregate limits ($70,800 for the 2012 election cycle). Hundreds of donors responded: 721 donors made maximum party contributions through Romney Victory, while 536 hit the party aggregate caps through the Obama Victory Fund. If the presidential candidates had been able to ask for contributions exceeding half a million dollars per year for all party committees in conjunction with their own campaign committees—as they would have absent aggregate limits—they would undoubtedly have done so. And donors would almost certainly have responded with six-figure contributions.[7]

---

[7] Such joint fundraising committees are not limited to presidential candidates. For example, House Speaker John Boehner operates "a joint fundraising committee composed of Friends of John Boehner ..., the National Republican Congressional Committee ..., THE FREEDOM PROJECT ... and the Ohio Republican Party State Central & Executive Committee," which accepts donations from individuals of more than *ten times* the maximum contribution an individual could make to the candidate directly. Team Boehner, *Contribute*, https://www.geticontribute.com/teamboehner (last visited July 24, 2013).

All told, more than 1,700 donors gave the maximum permitted amount to committees of the major parties in the 2012 election cycle, accounting for well over $100 million in contributions.[8] Almost 600 reached the aggregate limit on contributions to federal candidates. These figures indicate the extent to which the existing limits provide scope for substantial contributions by those who are in a position to, and choose to, make them. But they also starkly reveal the potential for candidates and officeholders to solicit far larger contributions if allowed to do so.

2. For the reasons described above, the government has a strong anti-corruption interest in preventing the massive combined contributions that would occur absent aggregate limits, even where those funds were not ultimately spent directly to support a targeted candidate. But, in practice, it is likely that parties and candidates *would* find ways to ensure that large contributions were spent on behalf of those candidates the contributors sought to obligate, exacerbating the problem. Candidates, political parties, and their associated committees have substantial freedom to transfer funds to each other, and to spend them to support can-

---

Similarly, in 2010, California Senator Barbara Boxer operated a variety of joint fundraising committees, joining forces with the Democratic National Committee, the Democratic Senatorial Campaign Committee, the California Democratic Party, and other federal candidates to solicit amounts supporting her reelection that significantly exceeded the limit on direct contributions to her campaign committee. *See* Knott, *Politicians Create Record Number of Joint Fundraising Committees*, Roll Call (Sept. 17, 2010), http://www.rollcall.com/news/-49934-1.html?pg=1.

[8] This number includes donors who gave through the presidential candidates' joint fundraising committees as well as others who did not.

didates of their choosing, making it possible to target contributions and to circumvent the base limits on contributions to candidates.

This potential for corruption and its appearance exists because federal campaign finance law quite appropriately recognizes the important role of political parties in our system and fosters their relationship with their candidates. Ironically, when the current aggregate limits that appellants target were established in the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, they reflected substantial *increases* designed to ensure that although parties would henceforth be limited to "hard-money" contributions (i.e., those subject to FECA's limits), the parties' fundraising and their relationship to their candidates would not be handicapped. Prior to BCRA's enactment, contributions to national party committees were limited to $20,000 per year, subject to the $25,000 aggregate limit that had remained unchanged since the time of *Buckley*. BCRA significantly increased the limits on contributions to each national party committee and provided for the first time that they would be indexed for inflation. BCRA also substantially increased the overall aggregate limit, indexed it to inflation, and created sub-aggregate limits within it so that contributions to candidates and parties no longer applied toward the same limit.

In addition to benefiting from these very high contribution limits, the political parties have the freedom to transfer *unlimited* amounts of the funds they raise among their national, state, and local party committees. 2 U.S.C. § 441a(a)(4). Thus, the parties may divide and direct their financial resources as they see fit. Party committees may make substantial expenditures of the-

se funds in coordination with their candidates—from just below $100,000 to over $2.5 million for Senate candidates (depending on the population of the state), nearly $50,000 for most candidates for the House of Representatives,[9] and well over $20 million for candidates for the Presidency.[10] In addition, the parties may make *unlimited* non-coordinated expenditures in support of their candidates. *See McConnell*, 540 U.S. at 213-219 (invalidating BCRA provision that required parties to choose between engaging in limited coordinated spending and unlimited coordinated spending); *see also Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604 (1996) (*Colorado I*) (holding that First Amendment prohibits restriction on parties' non-coordinated spending). Candidates may also contribute funds from their own campaign committees to other candidates (subject to FECA contribution limits, *see* 2 U.S.C. § 432(e)(3)(B)), and they may make *unlimited* transfers of their campaign committee funds to national and state party committees, which can then use them to

---

[9] A higher limit, equal to that of the limit applicable to Senate candidates in the least populous states, applies for House candidates who campaign statewide in those same states because they have only one United States Representative.

[10] *See* FEC, *2013 Coordinated Party Expenditure Limits*, http://www.fec.gov/info/charts_441ad_2013.shtml (last visited July 24, 2013); FEC, *2012 Coordinated Party Expenditure Limits*, http://www.fec.gov/info/charts_441ad_2012.shtml (last visited July 24, 2013). The limits on coordinated spending for House and Senate races apply separately to the national party committees and state party committees in the relevant state. A state party committee can assign its spending right to the national party committee, or vice versa, thereby doubling the coordinated spending by the party committee. *See* 11 C.F.R. § 109.33.

support other party candidates through coordinated or non-coordinated expenditures.

These features of our campaign finance laws, as enacted by Congress and interpreted and limited by this Court, reflect the central importance of political parties to our country's electoral process. As this Court has stated:

> The formation of national political parties was almost concurrent with the formation of the Republic itself. Consistent with this tradition, the Court has recognized that the First Amendment protects "the freedom to join together in furtherance of common political beliefs[.]"

California Democratic Party v. *Jones*, 530 U.S. 567, 574 (2000) (citation omitted) (quoting *Tashjian* v. *Republican Party of Conn.*, 479 U.S. 208, 214 (1986)). By permitting the parties, their leaders, and their candidates to work together to wage effective political campaigns, the campaign finance laws foster these important interests. And by allowing candidates and officeholders to participate in the work of their parties by soliciting lawful contributions for other candidates and party organizations subject to applicable limits, the laws avoid unduly circumscribing First Amendment rights. *See McConnell*, 540 U.S. at 314 (Kennedy, J., concurring in judgment in part and dissenting in part) ("These provisions help ensure that the law is narrowly tailored to satisfy First Amendment requirements.").

At the same time, the close relationships among the parties and their candidates and officeholders, together with the features of the campaign finance laws described above, create obvious potential means for fostering corruption and its appearance. As this Court has

recognized, political parties, in addition to their many positive functions in fostering an effective and competitive representative democracy, may also serve as "agents for spending on behalf of those who seek to produce obligated officeholders" and "conduits for contributions meant to place candidates under obligation." *Colorado II*, 533 U.S. at 452.

McConnell, upholding the ban on party soft-money contributions that was recently summarily reaffirmed by this Court in *Republican National Committee*, 130 S. Ct. 3544, explained:

> The idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible. For nearly 30 years, FECA has placed strict dollar limits and source restrictions on contributions that individuals and other entities can give to national, state, and local party committees for the purpose of influencing a federal election. The premise behind these restrictions has been, and continues to be, that contributions to a federal candidate's party in aid of that candidate's campaign threaten to create—no less than would a direct contribution to the candidate—a sense of obligation. This is particularly true of contributions to national parties, with which federal candidates and officeholders enjoy a special relationship and unity of interest.

540 U.S. at 144-145 (citation omitted).

These concerns led the *Buckley* Court to conclude that, absent aggregate contribution limits, large contributions to parties would threaten corruption of candi-

dates. *Buckley*'s concerns are no less real today. Then, as now, a contribution to a party earmarked to benefit a particular candidate was treated as a contribution to that candidate, and was subject to the limit on individual contributions to that candidate. *See Buckley*, 424 U.S. at 24; 2 U.S.C. § 441a(a)(8). Nonetheless, the difficulty of policing against tacit understandings that a large party contribution would be spent to support a particular candidate led the Court to conclude that large, "*unearmarked*" contributions created a sufficient threat of corruption to justify the "modest" restriction imposed by aggregate limits. *Buckley*, 424 U.S. at 38 (emphasis added).

The Court in *Colorado II* similarly explained that the earmarking rule "would reach only the most clumsy attempts to pass contributions through to candidates." 533 U.S. at 462. The prospect that large donations to parties may be targeted to benefit particular candidates is fostered not only by the parties' ability to transfer funds between committees at will and spend it to support their candidates, but also by the reality of "actual political conditions":

> Donations are made to a party by contributors who favor the party's candidates in races that affect them; donors are (of course) permitted to express their views and preferences to party officials; and the party is permitted (as we have held it must be) to spend money in its own right. When this is the environment for contributions going into a general party treasury, and candidate-fundraisers are rewarded with something less obvious than dollar-for-dollar pass-throughs (distributed through contributions and party spending), circumvention [of

> contribution limits] is obviously very hard to trace.

Id.

Past experience provides ample evidence that candidates and party committees at both the national and state levels will work together to ensure that funds are spent for the donor's targeted purposes. In *Colorado II*, this Court cited evidence that "[d]onors give to the party with the tacit understanding that the favored candidate will benefit," and indeed that "the frequency of the practice and the volume of money involved" necessitated an "informal bookkeeping" system for tracking desired beneficiaries, known as "tallying." 533 U.S. at 458, 459. The *McConnell* Court likewise concluded that donors often made large donations to parties accompanied by requests that they be "credited to particular candidates, and the parties obliged, irrespective of whether the funds were hard or soft." 540 U.S. at 146.

Moreover, as discussed above, "[n]ational party committees often teamed with individual candidates' campaign committees to create joint fundraising committees, which enabled the candidates to take advantage of the party's higher contribution limits while still allowing donors to give to their preferred candidate." *McConnell*, 540 U.S. at 93. And "national parties often made substantial transfers of soft money to 'state and local political parties ... that in fact ultimately benefit[ed] federal candidates because the funds for all practical purposes remain[ed] under the control of the national committees.'" *Id.* at 131. In short, there is every reason to think that if contributors are permitted to give a large *aggregate* amount to multiple party committees and candidates, they will be able to direct

those funds to the benefit of specific candidates and officeholders they wish to obligate, circumventing base limits and creating the potential for both corruption and its appearance.

3. Appellants contend that the aggregate limits no longer serve an anti-corruption purpose because the limits on contributions to individual party committees—which appellants do not challenge here—now preclude "huge" contributions. *See* McCutcheon Br. 40-43; RNC Br. 19-24. But absent the aggregate limits challenged here, a contributor seeking to assist a single candidate could give a total of $194,400 per election cycle to the three national party committees. The contributor could also directly contribute an additional $5,200 per election cycle to that candidate (assuming both a primary and general election campaign), for a combined total of nearly $200,000.

Appellant RNC asserts (at 42) that such a contribution is not "huge," although it is almost four times the median annual income of U.S. households and exceeds the annual salaries of all members of the Senate and House of Representatives except the Speaker of the House.[11] Congress, having made the judgment that contributions of greater than $5,200 posed a risk of corruption, could permissibly determine that contributions nearly 40 times larger to national party committees could similarly pose a risk of corruption. As this Court has recognized, it has "'no scalpel to probe' each possi-

---

[11] *See* U.S. Census Bureau, *State & County QuickFacts*, http://quickfacts.census.gov/qfd/states/00000.html (last visited July 25, 2013); Brudnick, Congressional Research Service, *Congressional Salaries and Allowances* 10 (2013), *available at* http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0E%2C*PL%5B%3D%23P%20%20%0A.

ble contribution level" and "cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives." *Randall*, 548 U.S. at 248 (opinion of Breyer, J.). Congress's judgment that the size of the national party contributions that would be allowed if the aggregate limits were lifted would pose a threat of corruption should not be overturned on the basis of a subjective judgment that $200,000 is not "huge" enough.

Moreover, appellants do not dispute Congress's judgment that donations to national party committees above the base limit present a significant threat of corruption. But if a contribution to one national party committee exceeding $64,800 per election cycle poses enough of a threat of corruption to justify setting the limit for contributions to the committee at that level, a significant *additional* contribution to another related national party committee that could immediately turn the money over to the first committee poses just as much of a threat. Because the national party committees are all instruments of a single political enterprise—the party—it makes perfect sense for the aggregate limit for all party committees to be very close to the level of the limit for a single party committee. A contribution to one committee is, functionally, little different from a contribution to all of them (or, put another way, to the "national party" as a unified entity).

In any event, focusing solely on the national party committees misses more than half the point of the aggregate limits on party and political committee contributions. Given appellants' position that the aggregate limits for both national and state party committees must stand or fall together, their insistence (RNC Br. 42 n.33) that this Court should disregard the effect of

abrogating aggregate limits on state as well as national party committees is nonsensical. Absent the aggregate limit, a contributor would be able to give the party of his or her favored candidate not only the $194,400 per election cycle that would be allowed for the national party committees, but also another $1,000,000 per election cycle for federal campaign purposes to all of the party's *state* committees. All of that money could then be rerouted by the party to a committee that would spend it to advance the prospects of a particular candidate. *Cf. McConnell*, 540 U.S. at 156 (explaining that national party effectively retained control over funds held by state party). Such a contribution would be "huge" by any realistic measure, and certainly large enough to pose what Congress could legitimately judge to be a threat of corruption.

4. Permitting the parties and their candidates to solicit and receive contributions of millions of dollars from individual donors would again foster the appearance that our officeholders and our government are for sale. That is the judgment Congress expressed in enacting aggregate limits, and the Court "must give weight to attempts by Congress to seek to dispel either the appearance or the reality of [improper] influences" as long as the remedies chosen by Congress "comply with the First Amendment." *Citizens United*, 558 U.S. at 361. Here, Congress has enacted remedies long recognized by this Court as complying with the First Amendment: limits on campaign contributions. Setting aside those carefully constructed limits, which respect the important interests of candidates and political parties as well as the critical need to prevent the corrupting influence of extremely large contributions, would indeed threaten to "cause the electorate to lose faith in our democracy." *Id.* at 360.

This Court must not countenance, let alone bring about, that result.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009

FRED WERTHEIMER
DEMOCRACY 21
2000 Massachusetts Ave., NW
Washington, DC 20036

DONALD J. SIMON
SONOSKY, CHAMBERS,
SACHSE, ENDRESON
& PERRY, LLP
1425 K Street, NW
Suite 600
Washington, DC 20005

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
WEILI J. SHAW
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 6[illegible]3-6800
seth.waxman@wilmerhale.com

ROGER M. WITTEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
New York, NY 10007

JULY 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
MAY 13 2013
OFFICE OF THE CLERK

NO. 12-536

In the

Supreme Court of the United States

SHAUN McCUTCHEON and
REPUBLICAN NATIONAL COMMITTEE,
Appellants,
v.
FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States
District Court for the District of Columbia

AMICUS CURIAE BRIEF OF THE WISCONSIN INSTITUTE FOR LAW & LIBERTY IN SUPPORT OF THE APPELLANTS

Richard M. Esenberg
Counsel of Record
Thomas C. Kamenick
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Bloodgood House
1139 East Knapp Street
Milwaukee, WI 53202
414-727-9455
rick@will-law.org

Counsel for Amicus

May 13, 2013

Library of Congress
Law Library

Table of Contents

Table of Contents i

Table of Authorities iii

Interest of Amicus 1

Summary of Argument 2

Argument 3

I. Bifurcated Scrutiny of Expenditures and Contributions Results in Inadequate Protection of Political Speech and Association, and Contributes to Distortion of the Political Process 3

A. Expenditures Receive Full and Appropriate Constitutional Protection .. 6

B. Strong Protection for Independent Expenditures Extends to Contributions Made for that Purpose 8

C. Contributions to Candidates, Parties, and Political Committees Do Not Receive Adequate Constitutional Protection 10

D. Binary Review Contributes to Distortion of the Political Process 13

II. This Court Should Abandon Differing Review of Expenditures and Contributions 16

A. The Distinction Between Expenditures and Contributions Cannot Support Differing Standards of Review 16

B. Departure from Existing Precedent Is Warranted in Light of Doctrinal Development and Its Impact 22

Conclusion **24**

Table of Authorities

CASES

Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011) 7, 11, 18

Buckley v. Valeo, 424 U.S. 1 (1976) 5, 6, 7, 8, 9, 11, 21, 24

California Med. Assoc. v. FEC, 453 U.S. 182, 197 (1981) 11

Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, 454 U.S. 290 (1981) 11

Citizens United v. FEC, 558 U.S. 310 (2010) .7, 8, 16, 18, 21, 23

Clark v. Jeter, 486 U.S. 456 (1988) 12

Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 638-39 (1996) 17

Davis v. FEC, 554 U.S. 724 (2008) 6, 8, 11, 21, 24

FEC v. Beaumont, 539 U.S. 146 (2003).....11

FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) 8, 9 11, 21

FEC v. Nat'l Conservative PAC, 470 U.S. 480, 493 (1985) 7, 18

FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982).....11

FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).....6, 7, 8, 22

Grutter v. Bollinger, 539 U.S. 306 (2003).....21

Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684 (9th Cir. 2010) 9

Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) 9

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).....5, 11, 17

North Carolina Right to Life, Inc., v. Leake, 525 F.3d 274 (4th Cir. 2008) 9

Randall v. Sorrell, 548 U.S. 230 (2006) 11

SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) 9, 15

Wis. Prosperity Network v. Myse, 2012 WI 27, 339 Wis. 2d 243, 810 N.W.2d 356 1

Wis. Right to Life State PAC v. Barland, 664 F.3d 139 (7th Cir. 2011) 8, 9

CONSTITUTIONS, STATUTES, REGULATIONS

Wis. Stat. § 11.26(4) 19

OTHERS

Robert P. Beard, *Whacking the Political Money "Mole" Without Whacking Speech: Accounting for Congressional Self-Dealing in Campaign Finance Reform After* Wisconsin Right to Life, 2008 U. ILL. L. REV. 731 5

Joseph E. Cantor, Government and Finance Division, *CRS Issue Brief for Congress*, 2 (2003) 3

Congressional Campaigns: Half of Outside Spending in Campaigns Came from Groups

Not Revealing Donors, BNA MONEY & POL. REP., Nov. 12, 2010 13

Erika Franklin Fowler & Travis N. Ridout, *Advertising Trends in 2010*, The Forum 11 (2010) 14

Matea Gold, *2012 Campaign Set to Cost a Record $6 Billion*, L.A. TIMES, October 31, 2012 3

Michael S. Kang, *The End of Campaign Finance Law*, 98 Va. L. Rev. 1 (2012) 8, 13, 14

Charles Krauthammer, *The U.S. House of Lords?*, WASH. POST, Dec. 19, 2008, at A35 4

Bill Lueders, *Baldwin-Thompson Senate race sets new spending record, led by outside groups*, WisWatchBlog (Oct. 26, 2012) 14, 15

David Mark, GOING DIRTY: THE ART OF NEGATIVE CAMPAIGNING (2006) 5

William P. Marshall, *The Last Best Chance For Campaign Finance Reform*, 94 NW. U. L. REV. 335, 342–45 (2000) 6

Douglas Martin, *Stewart R. Mott, Longtime Patron of Liberal and Offbeat Causes, Dies at 70*, N.Y. TIMES, June 14, 2008, at B6 4

Kerwin C. Swint, MUDSLINGERS: THE TOP 25 NEGATIVE POLITICAL CAMPAIGNS OF ALL TIME (2006) 5

Wisconsin Democracy Campaign, *Walker, Donors Accused of 24 Violations of Campaign Finance Law*, July 6, 2011, www.wisdc.org/pr070611.php 20

Interest of Amicus

Amicus Wisconsin Institute for Law & Liberty[1] is a public interest law firm dedicated to advancing the public interest in limited government, free markets, individual liberty, and a robust civil society. Founded in June of 2011, it has represented individuals and organizations seeking to speak or to associate with others for the purpose of speech, including the petitioners in *Wis. Prosperity Network v. Myse*, 2012 WI 27, 339 Wis. 2d 243, 810 N.W.2d 356, a challenge to certain Wisconsin regulations restricting and burdening independent express and issue advocacy and certain parties seeking to challenge Wisconsin state aggregate contribution limits that cap aggregate limits at the same dollar amount as individual limits for state wide offices. Its President, General Counsel and Founder, Richard M. Esenberg, teaches Election Law at Marquette University Law School and is an Academic Advisor to the Center for Competitive Politics. His scholarship[2] argues for less regulation and more

---

[1] As required by Supreme Court rule 37.6, Amicus states as follows. No counsel for a party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Amicus, its members, or its counsel, made such a monetary contribution. Consent has been given by all parties for this brief.

[2] *See, e.g.*, Richard M. Esenberg, *If You Speak Up, Must You Stand Down: Caperton and Its Limits*, 45 WAKE FOREST L. REV. 1287 (2010); Richard M. Esenberg, *The Lonely Death of Public Campaign Financing*, 33 HARV. J.L. & PUB. POL'Y 283 (2010); Richard M. Esenberg, Citizens United *Is No* Dred Scott, 16 Nexus: Chap. J.L. & Pol'y 99 (2010-11); Richard M. Esenberg,

freedom for those who wish to speak about politics and matters of public policy, whether individually or in association with others.

Amicus frequently represents persons other than political parties, candidates or political parties who wish to exercise their freedoms of speech and association – particularly in the face of state regulation. In this capacity, it seeks guidance from this Court that will ensure robust protection of expressive and associational rights in the face of state and local regulation. These regulations are often applied to speakers who are unlikely to have the resources to seek federal review. To protect their rights, clear – and not subtle – constitutional protection is vital.

Summary of Argument

The aggregate limits at issue here do not serve any legitimate interest in combating actual or apparent quid pro quo corruption and can be upheld – if at all – only by the application of a highly deferential approach to the regulation of direct contributions to candidates. The Circuit Court's use of that approach to uphold aggregate limits that do not serve the anti-corruption objective illustrates the unworkability of this bifurcated form of review. While independent expenditures deserve every bit of protection they have been afforded, Amicus believes that the disparate treatment of contributions and expenditures distorts the political process and

---

Playing Out the String: Will Public Financing of Elections Survive McComish v. Bennett*?*, 10 ELECTION L.J. 165 (2011).

causes speakers to modify their messages and preferred forms of association. It respectfully requests this Court to reconsider its current approach and extend to all forms of political expression and association the constitutional protection that they deserve.

Argument

I.

Bifurcated Scrutiny of Expenditures and Contributions Results in Inadequate Protection of Political Speech and Association, and Contributes to Distortion of the Political Process

Almost 40 years of regulation, including two major acts of Congress and subsequent amendments, federal regulation and countless state and local counterparts have not kept money out of politics. We spend more than ever[3] and more than ever is undisclosed.[4]

---

[3] Total spending on all elections in the U.S. went from $540 million in 1976 to $3.9 billion in 2000, Joseph E. Cantor, Government and Finance Division, *CRS Issue Brief for Congress*, 2 (2003), available at http://fpc.state.gov/documents/organization/28105.pdf (last visited May 10, 2013), to an estimated $6 billion in 2012 which was $700 million more than in 2008, Matea Gold, *2012 Campaign Set to Cost a Record $6 Billion*, L.A. TIMES, October 31, 2012, available at http://articles.latimes.com/2012/oct/31/news/la-pn-2012-campaign-costs-6-billion-20121031 (last visited May 13, 2013).

[4] *See* Gold, *supra* n. 3 ("In all, C[enter for] R[esponsive] P[olitics] estimates that expenditures by outside groups will

But regulation has certainly changed the political landscape, albeit in unintended ways. By permitting virtually no restrictions on expenditures by a candidate and relatively robust regulation of contributions to a candidate, *see infra*, Parts I.A., I.B., I.C., the Court's interpretation of the First Amendment has created the modern phenomenon of the self-funded millionaire politician for whom public office is a prerogative of family wealth or a nice coda to a successful business career.[5] In 1972, General Motors heir Stewart Mott financed an experienced public servant, George McGovern.[6] In 1992, H. Ross Perot and Steve Forbes ran major self-funded campaigns.

Because giving money to independent groups offers a path of lesser resistance, money that might have gone to candidates now flows to independent expenditures. *See infra*, Part I.D. While independent expenditures can now finance express advocacy, bifurcated review has certainly contributed to the current phenomenon of sepia-toned advertisements urging us to call Senator Foghorn and tell him to stop starving children and destroying the Republic. Although negative campaigning is not a modern

---

reach more than $970 million this election. That's more than three times the previous record of $301 million in 2008.").

[5]. *See* Charles Krauthammer, *The U.S. House of Lords?*, WASH. POST, Dec. 19, 2008, at A35.

[6]. Douglas Martin, *Stewart R. Mott, Longtime Patron of Liberal and Offbeat Causes, Dies at 70*, N.Y. TIMES, June 14, 2008, at B6. Mott later opposed efforts at campaign finance regulation. *Id.*

development or solely the product of regulation,[7] the modern independent ad—attacking in the guise of attempting to persuade—has certainly been encouraged by regulation and the desire to avoid its limitations. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 406–07 (2000) (Kennedy, J., dissenting) (asserting that *Buckley v. Valeo*, 424 U.S. 1 (1976) has "given us covert speech" that "mocks the First Amendment"). The modern "shadowy" attack ad may be a product of the fact that the law encourages money to flow away from candidates who can no longer control – or be as readily held responsible for what it buys.

In part, this is because what cannot be done through contribution can be done with expenditure. Dollars that can no longer be given to a candidate are given to a political party. Money that cannot be contributed to a party is given to an independent organization. What cannot be done by a political committee is done by a 527 or 501(c)(4) organization. Dollars that can no longer be spent in one way simply flow to a new use. At least one commentator has likened campaign finance reform to a game of "Whack-A-Mole" in which there is an endless supply of moles. Robert P. Beard, *Whacking the Political Money "Mole" Without Whacking Speech: Accounting for Congressional Self-Dealing in Campaign Finance Reform After* Wisconsin Right to Life, 2008 U. Ill. L. Rev. 731.

---

[7]. *See* David Mark, GOING DIRTY: THE ART OF NEGATIVE CAMPAIGNING (2006); Kerwin C. Swint, MUDSLINGERS: THE TOP 25 NEGATIVE POLITICAL CAMPAIGNS OF ALL TIME (2006).

It may be a cliché to observe that campaign finance reform has proved conclusively that the road to perdition is paved with good intentions and that unforeseen consequences plague the human condition.[8] Our continuing quest for "clean" elections and cosmic justice in the realm of campaign finance brings to mind Albert Einstein's reflections on insanity: "doing the same thing over and over again and expecting different results." Remarking on the inability of years—actually decades—of reform to wring "excess" money out of the process, Chief Justice John Roberts declared, "Enough is enough." *FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 551 U.S. 449, 478 (2007).

A. Expenditures Receive Full and Appropriate Constitutional Protection

Much of this distortion is rooted in the weakened constitutional protection for campaign contributions. This Court has consistently recognized that it is essential to provide robust constitutional protection to expenditures for the purpose of political advocacy – whether it be an individual seeking to spend his own resources on behalf of his candidacy, *Buckley*, 424 U.S. at 51-54; *Davis v. FEC*, 554 U.S. 724, 738-44 (2008), a

---

[8] *See* William P. Marshall, *The Last Best Chance For Campaign Finance Reform*, 94 NW. U. L. REV. 335, 342–45 (2000) (listing examples of unintended consequences of reform: a decline in grassroots campaigning, the rise of "soft money" for "party building," issue ads, independent ads, and a substantial increase in the time that must be devoted to fundraising and bundling).

candidate deciding how much lawfully raised money to spend on her own campaign, *Buckley*, 424 U.S. at 54-58; *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818-19 (2011), or independent individual groups seeking to speak at the time of an election. *WRTL II*, 551 U.S. at 481-82; *Buckley*, 424 U.S. at 47-48. While the latter protection was limited to issue advocacy, there is now robust protection for expenditures expressly advocating for the election or defeat of candidates. *Citizens United v. FEC*, 558 U.S. 310, 318-19 (2010); *FEC v. Nat'l Conservative PAC* ("NCPAC"), 470 U.S. 480, 493 (1985) (invalidating expenditures by political action committees to further the election of publicly financed candidates for President).

It is difficult to see how it could be otherwise.

Money may not be speech, but effective speech has nearly always required the freedom to amass and spend the resources necessary to communicate one's message. A right to speak freely limited to the ability to stand on a street corner and shout at passing cars would be an empty right. *See NCPAC*, 470 U.S. at 493 (limitation of expenditures to $1,000 "much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system"). Free speech is incompatible with restrictions on the right of an individual or association to hear, to speak, and to use information, *Citizens United*, 558 U. S. at 339, and this Court has made quite clear that the First Amendment provides robust protection for expenditures to convey a political message. They are subject to strict scrutiny. *See, e.g.*, *Bennett*, 131 S. Ct. at 2817–18 (collecting

cases); *Citizens United*, 558 U.S. at 335-39; *Davis*, 554 U.S. at 740–44; *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441–42 (2001); *Buckley*, 424 U.S. at 55–56.

For this reason, as the Seventh Circuit recently noted, expenditure limits "usually flunk." *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 153 (7th Cir. 2011). This Court has now firmly established that only the interest in preventing actual or apparent quid pro quo corruption can justify restrictions on the ability to raise and spend money, *Citizens United*, 558 U.S. at 360-61; *see* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 4 (2012) ("Citizens United sharply reversed this expansion [of the types of corruption government had a compelling interest in discouraging] and narrowed the definition of corruption by limiting it to the risk of quid pro quo transactions involving campaign contributions directly to candidates for office."). It has now made clear that expenditures that are truly independent, i.e., not coordinated with a candidate, do not implicate that interest, *Citizens United*, 558 U.S. 360-61; *WRTL II*, 551 U.S. at 478-79. Expenditure limits ought to "flunk."

B. Strong Protection for Independent Expenditures Extends to Contributions Made for that Purpose

Although not yet addressed by this Court, a necessary corollary is that contributions to entities that intend to make independent expenditures may not be restricted. Although limits on contributions to

political candidates and committees have traditionally been subject to less rigorous "exacting" scrutiny, contributions, as well as expenditures, "fall within the First Amendment's protection of speech and political association." *Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 437; *Buckley*, 424 U.S. at 16-17.

Restricting the ability of persons to contribute money to associations that are independent of a candidate to make expenditures that will not be coordinated with a candidate does not serve the anti-corruption interest and, because that interest is the only one that will justify restrictions, few, if any, restrictions ought to be permitted – certainly not limits on what can be spent. As the D.C. Circuit has observed, "something ... outweighs nothing every time." *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*quoting Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)). Every Circuit Court to have addressed the issue in the aftermath of *Citizens United* has so concluded. *See Wisconsin Right to Life State PAC*, 664 F.3d at 154; *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684, 687 (9th Cir. 2010); *SpeechNow.org*, 599 F.3d at 694-695; *see also North Carolina Right to Life, Inc., v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008) (pre-dating *Citizens United*).

Thus, in the current campaign finance landscape, a person is free to spend his or her own resources to advocate for or against the election of a candidate. This freedom extends to corporations. Both natural persons (and presumably corporations)

are free to contribute to a corporation or other form of association – in other words, they may freely associate with others – for the purpose of spending money to advocate for or against the election of a candidate. Let us hypothesize a politically active citizen Mary Smith of Virginia – who wants to see a Democratic majority in the U.S. Senate. She may spend whatever she wants to speak in favor of her own election. She may also spend whatever she wishes to promote the re-election of Senator Mark Warner (D-Va.). She may give whatever she wants to advocacy organization to spend money advocating the re-election of Senator Warner. She may do these things, if she so desires and has the resources, for every Democratic candidate for Senator in the country.

But if Mary Smith, believing that candidates ought to control and be responsible for campaign messaging, wishes to give directly to Senator Warner's campaign or that of other Democratic candidates, she faces a very different legal environment.

C. Contributions to Candidates, Parties, and Political Committees Do Not Receive Adequate Constitutional Protection

What Ms. Smith may not do is give an amount in excess of the base contribution limit to Senator Warner or any other candidate. Restrictions on contributions to a candidate are subjected to less rigorous "exacting" scrutiny, requiring only that limitations be "closely drawn" to serve a "sufficiently

important interest." *Buckley*, 424 U.S. at 25; *see also Ariz. Free Enter.*, 131 S. Ct. at 2817; *Davis*, 554 U.S. at 737; *Randall v. Sorrell*, 548 U.S. 230 (2006); *Colo. Republican*, 533 U.S. at 446.

Applying this less-demanding standard of review, contribution limits usually do not flunk. *See, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 159–60 (2003) (upholding restrictions on campaign contributions made by an advocacy corporation); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 381–82 (2000) (upholding state campaign contribution limits); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209–10 (1982) (upholding restrictions on solicitations by a corporate PAC); *California Med. Assoc. v. FEC*, 453 U.S. 182, 197 (1981) (upholding limitations on contributions to multi-candidate committees); *Buckley*, 424 U.S. at 29 (upholding limitations on the amount of contributions).

Of course, there have been exceptions. In *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290 (1981), this Court invalidated limits on contributions to committees that supported or opposed ballot measures. In *Randall v. Sorrell*, 548 U.S. 230 (2006), the plurality invalidated Vermont's contributions as too low because they "would reduce the voice of political parties in Vermont to a whisper." 548 U.S. at 253 (Breyer, J., joined by Roberts, C.J., and Alito, J).[9]

---

[9] Justice Kennedy concurred in the judgment alone, expressing "skepticism regarding th[e] system and its operation," 548 U.S. at 265 (Kennedy, J., concurring in the judgment), while Justices Scalia and Thomas would have struck down the limits

Of course, exacting scrutiny is not akin to rational basis review. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988). It is heightened scrutiny, but it is inadequate where the First Amendment is concerned. It risks creating a form of "binary" review where too much turns on whether a regulation is characterized as a restriction on contributions or a restriction on expenditures.

Although it should not, "exacting scrutiny" can, in practice, result in review that is exacting by description, but deferential in practice. Restrictions on contributions generally do not "flunk" even when they should.

The decision below is a perfect example. There is no need for Amicus to repeat the thorough analysis of the Appellants' merits brief. *See, e.g.*, Brief for Appellant Shaun McCutcheon, 5-11, 35-54; Brief on the Merits for Appellant Republican National Committee, 26-43.

Because aggregate limits cannot result in a single contribution exceeding the limit set by Congress, they do not directly serve the anti-corruption interest. Because they restrict the number of candidates with whom a contributor may associate, they directly restrict the exercise of associational rights in a way that single contribution limits do not. Although they are claimed to serve an "anti-circumvention" interest, the circumvention scenarios that they might prevent are remote, and

---

by overruling *Buckley*, *id.* at 273 (Scalia, J. concurring in the judgment).

almost certainly illegal. No proof of the likelihood of circumvention was required. The government offered no evidence that they were likely or even possible and the district court itself acknowledged that the anti-circumvention rationale was predicated on an "unlikely" scenario that it could only "imagine." Even if such scenarios were more than conjecture, they could be better prevented by regulatory responses that are more narrow and direct. No serious consideration of alternatives was undertaken.

To be sure, exacting scrutiny requires a closer look but, as explained below, lower courts – and speakers – would benefit from a direction to apply strict scrutiny across the board.

D. Binary Review Contributes to Distortion of the Political Process

As noted above, the result of this legal regime is to move money from contributions to candidates to expenditures. As Professor Michael Kang recently pointed out, almost $300 million of the 2010 total campaign spending was spent by outside groups,[10] up from less than $75 million in 2006. Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 37 (2012). This amounts to an increase of 168% over 2008 in House races and 44% in Senate races. *Id.* at 38. The bifurcated review of expenditures and contributions creates a "reverse

---

[10] *Congressional Campaigns: Half of Outside Spending in Campaigns Came from Groups Not Revealing Donors*, BNA MONEY & POL. REP., Nov. 12, 2010.

hydraulics" in which money flows back to where it had originally been steered away from. *Id.* at 40-43.

In Amicus' home state of Wisconsin, the recent Senate race between Democrat Tammy Baldwin and Republican Tommy Thompson was dominated by independent expenditures. In a report published several days before the election, it was revealed that, while Ms. Baldwin had spent $8.5M and Mr. Thompson had spent $3.8M, independent expenditures had been almost three times higher at $ 30.8 million.[11]

While this may diminish the risk of quid pro quo corruption, it artificially distorts the political process. The consequence can be campaigns that are less about the candidates than about the messaging preferred by independent organizations. The latter – because they can't be attributed to a candidate – are not disciplined by the need for anyone to stand behind them. They are, as a result, far more likely to be negative and corrosive.

Independence comes at a cost. Independent spenders are less likely to be accountable. Candidates have a reputation to protect and can be held accountable by voters for what they say. While permanent advocacy organizations which must retain financial support and credibility may also

---

[11] Bill Lueders, *Baldwin-Thompson Senate race sets new spending record, led by outside groups*, WisWatchBlog (Oct. 26, 2012) (available at http://www.wisconsinwatch.org/2012/10/26/baldwin-thompson-senate-race-sets-new-spending-record-led-by-outside-groups/) (last visited May 10, 2013).

have accountability concerns, independent organizations with generic and malleable monikers (not to mention anonymous donors) are often formed for purposes of a single election. There is evidence that independent ads are far more likely to be negative than candidate ads. See Erika Franklin Fowler & Travis N. Ridout, *Advertising Trends in 2010*, THE FORUM 11 (2010) (analyzing advertising data).

In an analysis conducted by the Wisconsin Center for Investigative Journalism, roughly 90 % of the independent spending in the Baldwin-Thompson Senate race – spending that was several times that of the candidates' – went for attack ads.[12]

The point is not that independent expenditures and communications are bad – they are, to the contrary, constitutionally protected communications and a vital part of our democracy Because expenditures are independent, they do not raise concerns about corruption or even the appearance of corruption. As the D.C. Circuit has observed, "there is no corrupting 'quid' for which a candidate might in exchange offer a corrupt 'quo.'" *SpeechNow.org v. FEC*, 599 F.3d 686, 694-95 (D.C. Cir. 2010).

It is that the interplay between regulation and constitutional doctrine compels people to communicate in ways that they might otherwise choose not to do. The balance between candidate and independent speech is unnaturally altered. It is one

---

[12] *Id.*

thing for people to decide to spend money independently if that is what they wish to do. It is another for this to occur because they have no other way to lawfully spend as much as they would prefer to do. When legal rules cause people who wish to pool their resources and participate in the political resources to engage in avoidance behaviors, we ought to be concerned. Political speech is "ingrained" in our culture and Americans are hard wired to express themselves. *Citizens United v. FEC*, 558 U.S. 310, 364 (2010). They ought to be able to do so in an environment that is not artificially contrived to force supporters to speak in one way and push candidates to the side. *Id.* ("Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights.").

II.

This Court Should Abandon Differing Review of Expenditures and Contributions

A. The Distinction Between Expenditures and Contributions Cannot Support Differing Standards of Review

The distinction between expenditures and contributions is not sufficiently robust to warrant this binary form of review. In particular, it is simply not the case that contributions *qua* contributions are sufficiently different from expenditures to warrant a differing level of review. As Justice Thomas, for example, has argued, whether one chooses to participate by expenditure or contribution, there is

"usually some go-between that facilitates the dissemination of the spender's message—for instance, an advertising agency or a television station" such that calling a contribution "'speech by proxy' . . . does little to differentiate it from an expenditure." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 413 (2000) (Thomas, J., dissenting), *quoting Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 638-39 (1996) (Thomas, J., concurring in judgment and dissenting in part)). Nor is it correct in Justice Thomas's view to state that a contribution to a candidate does not constitute communication by the donor who, in contributing, endorses and facilitates a message (that of his candidate) that he prefers. A larger contribution communicates "more" in the same way as a larger expenditure. Buckley's distinction between expenditures and contributions, in his view, "ignores the distinct role of candidate organizations as a means of individual participation in the Nation's civic dialogue." *Id.* at 417.

For example, our hypothetical Mary Smith, if she wishes to produce a communication for broadcast or on-line distribution, will probably engage someone to produce it. That she associates with another to craft a message does not make the resulting communication any less her own or diminish the constitutional protection to which she is entitled. No one is constitutionally permitted to tell her that she has spent "enough." While the expressive and associational value of a contribution may differ in some ways, they don't differ enough to warrant differing levels of scrutiny.

She has engaged in an expressive act. By choosing to contribute, she must "obviously like the message . . . and want to add [her] voice[] to that message." *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 495 (1985). Just as the third parties in *Bennett*, a restriction on "how much" expression that she is permitted or a burden imposed on her decision to support "too much" speech is an imposition that ought to surmount strict scrutiny.

In *Citizens United*, this Court recognized that preventing the speech of incorporated associations muffled voices by preventing corporations from "presenting both facts and opinions to the public." 558 U.S. at 355. In *Bennett*, it recognized that "rescue funding" offered to publicly financed candidates in response to constitutionally protected speech forced speakers to alter their message or refrain from speaking to avoid triggering these matching fund provisions. This, it concluded, was a constitutional burden calling for strict scrutiny. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2819-20 (2011).

Contribution restrictions may also prevent or diminish speech by making it more difficult for candidates to raise the resources necessary to effectively communicate, thus "muffling" their voices. While *Randall* was certainly correct in holding that contribution limits which were so low as to silence challengers was unconstitutional, this certainly is not the only way in that restrictions on contributions may limit core political speech in a way that merits the most careful form of review.

Given the differing ways in which contribution restrictions impact expressive and associational interests and the greater possibility that the anti-corruption interest will be served, limits on the amount that one may give directly to a candidate for public office may more often survive strict scrutiny than limits on expenditures do. For example, the application of contribution limits to bequests may not implicate anti-corruption concerns in the same ways. Prohibitions on contributions by corporations or persons with certain relationships to the government as well as limitations on when contributions may be made may constitute more substantial burdens than limits on the size of contributions. As noted above, limits on the size of contributions may distort and muffle speech in ways less severe than present in *Randall* but still of critical constitutional concern. In different circumstances, the strength of the interest in preventing *quid pro quo* corruption will vary.

Even on the issue before the Court, more or less onerous burdens on speech can be presented by aggregate contribution limits. For example, in Amicus' home state of Wisconsin, the aggregate limit for contributions to candidates and committees is $ 10,000. Wis. Stat. § 11.26(4). This is equal to the maximum contribution that can be made to a single candidate for state-wide office. Thus, a person who wished to contribute the maximum amount to Governor Scott Walker can make no other contributions – not to another candidate for state

wide office nor, for that matter, to his local alderman.[13]

When contribution limits can impose those kinds of burden on expressive and associational rights, it is essential to make clear that only strict scrutiny applies – not only so that aggrieved parties will win their particular cases, but so that legislators and regulators will be apprised of the critical constitutional interests at stake.

Seen in this way, the expressive and associational interests burdened by contribution restrictions are not materially different than those impaired by expenditure limits. To borrow the phrasing of the panel in *SpeechNow.org*, both burden constitutional rights in a way that constitutes "something" and, upon closer examination, that "something" does not differ in any material way.

To be sure, contributions may – but will not always – present a risk of quid pro quo corruption that is not present with expenditures (although the aggregate limits at issue here do not do so). The "something" that is burdened by contribution limits may be less likely to encounter a posited state interest that amounts to "nothing." But those differences ought to be addressed in the application

---

[13] The limits result in a biannual ritual of complaints filed by advocacy organizations against campaigns and individuals who inadvertently exceeded the limit – often by a small amount. *See, e.g.*, Wisconsin Democracy Campaign, *Walker, Donors Accused of 24 Violations of Campaign Finance Law*, July 6, 2011, www.wisdc.org/pr070611.php (last visited May 13, 2013).

of a standard requiring robust constitutional protection rather than a regime of bifurcated review in which the case turns largely on the way in which a regulatory scheme is characterized. The old law school adage that such review is "strict in theory, but fatal in fact" is true in general, but often proves to be false in the particular. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding government racial discrimination against strict scrutiny).

The reason is simple. Restrictions on contributions limit the ability of individuals to associate with candidates for public office and to participate in the political process. At the same time, limitations restrict the ability of candidates – particularly the unwealthy, unknown, and un-incumbent – to amass the resources necessary to communicate. Even if one believes that an anti-corruption interest might justify limits on what can be contributed to a candidate or committee, there is no doubt that what we are dealing with is core political speech where First Amendment concerns are at their height. *See Citizens United*, 558 U.S. at 335-39; *Davis v. FEC*, 554 U.S. 724, 740-44 (2008); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. at 441–42; *Buckley v. Valeo*, 424 U.S. 1, 55-56 (1976).

Strict scrutiny ought to be the standard. Under the Court's current approach, the presumptions are in favor of regulation and against the expressive and associational interests implicated by whatever might be characterized as a "contribution." But in this core area of First Amendment rights, it is far better that the

presumption be in favor of speech. "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL II*, 551 U.S. 449, 474 (2007) (Roberts, C.J.).

B. Departure from Existing Precedent Is Warranted in Light of Doctrinal Development and Its Impact

As appellants point out, it is certainly possible to dispose of this case by correcting error. This Court could conclude that the Circuit Court improperly applied the "exacting scrutiny" standard. This is a case in which "something" – the expressive and associational rights of those who support "too many" candidates and committees at non-corrupting levels – is met by nothing.

But Amicus believes that, in the critical area of political speech – where First Amendment protections are at their height – more is required.

We are aware of the value that the Court properly places on stare decisis and we cannot say anything about the reasons to adhere to or depart from precedent that is not well known to the Justices of this Court. Stare decisis is at its weakest on constitutional questions. *WRTL II*, 551 U.S. at 500 (Scalia, J., concurring) ("This Court has not hesitated to overrule decisions offensive to the First Amendment . . . ."). As Chief Justice Roberts recognized in *Citizens United*, *stare decisis* is not an "inexorable command" or a "mechanical formula of adherence to the latest decision," but a "principle of policy" requiring a "sober appraisal of the

disadvantages of the innovation" against "those of the questioned case." 558 U.S. at 378 (Roberts, C.J., concurring).

As in *Citizens United*, no reliance interests are at stake here where adjustment of the level of scrutiny accorded contribution restrictions will, if dispositive in any particular case, merely permit people to act where they have been unable to act. *Id.* at 365. Permissible regulations have been steadily eroded to constitutional challenge. The relatively unfettered ability to spend money for issue advocacy has become – quite properly – the relatively unfettered ability to spend money for express advocacy. The relatively unfettered ability to spend one's own money for independent communications has expanded – quite properly – to the relatively unfettered ability to contribute money for independent communications. Arguments that free speech must be compromised to "level the playing field" or serve some broader notion of "corruption" have been considered and found wanting. To continue to subject contributions to those who are actually running for office to a lesser form of scrutiny can only, in light of these developments, distort the political process to no great end.

Disparate scrutiny of contributions and expenditures has been predicated on the notion that restrictions on the former are not distorting, *i.e.*, that they do not materially "undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional

press, candidates, and political parties." *Buckley*, 424 U.S. at 28-29.

Certainly candidates still raise money. But experience has shown that the differing scrutiny of one mode of expression and association can distort the process and result in a misallocation of resources. Privileging contributions over expenditures by *a priori* designation of a differing form of scrutiny contributes to distortion of the political process.

In *Davis*, Justice Alito considered the argument that regulation that has made it harder for those who are not wealthy to raise funds and distorted "the normal relationship between a candidate's financial resources and the level of popular support for his candidacy." 554 U.S. at 743. In that case, the Court concluded that the answer to any such distorting effect was to eliminate or raise those limits rather than further restrict speech. *Id.*

In the same vein, that distortion ought not be permitted unless it serves a compelling interest. We are talking about the First Amendment in its most critical context. We are talking about democracy and core political speech.

Enough is enough.

CONCLUSION

For the foregoing reasons, Amicus Wisconsin Institute for Law & Liberty respectfully requests that this Court hold that restrictions on

expenditures and contributions ought to be subjected to strict scrutiny and reverse the decision below.

Respectfully submitted,

Richard M. Esenberg
Counsel of Record
Thomas C. Kamenick
WISCONSIN INSTITUTE FOR LAW & LIBERTY
Bloodgood House
1139 E. Knapp Street
Milwaukee, WI 53202
414/727-9455 telephone
rick@will-law.org
Counsel for Amicus

May 13, 2013